SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 398.

C. A. RANDOLPH,
Petitioner,

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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IN THE

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THE MISSOURI BAR ADVISORY COMMITTEE,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

FOREWORD.

This case was tried before the Commissioner and in the Supreme Court of Missouri on a typewritten transcript consisting of eleven volumes and many exhibits not attached to the transcripts. The Commissioner's report was filed with the Court in typewritten form, a certified copy of which is included in the transcript prepared by the Clerk of the Missouri Supreme Court. Informants printed

the Commissioner's report and filed printed copies with the Missouri Supreme Court.

References in this petition to the Commissioner's Report give the local citations to the printed transcript furnished by Informants. A copy of the printed transcript with the Missouri Supreme Court's filing stamp thereon has been withdrawn from that Court and is included with the eleven typewritten transcripts and the two books containing the record of the case before the Missouri Supreme Court.

The abbreviation "Comm. Rep." refers to the printed copy of the Commissioner's Report above referred to. The word "Opinion" refers to the Opinion of the Supreme Court of Missouri. Page references to the typewritten transcript are given in the following manner: First the figure indicating the particular volume followed by a dash, and following the dash the figure of the specific page reference.

Petitioner has heretofore filed in the Supreme Court of Missouri a motion for an order by the Chief Justice and Presiding Judge to transmit all the original exhibits in the cause to this Court and requesting that said exhibits be forwarded. The Court has not yet acted upon this motion.

Petitioner, C. A. Randolph, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, *en Banc*, in the case of The Missouri Bar Advisory Committee, Prosecutors, vs. C. A. Randolph, Respondent, No. 45936, entered on May 8, 1961, disbarring this Petitioner.

(a) OPINIONS BELOW.

This is a disbarment proceeding brought directly in the Supreme Court of Missouri, *en Banc*, as an original proceeding under the procedure provided by Rule 5 of the Missouri Supreme Court. The Missouri Supreme Court appointed Honorable Robert V. Neidner, Special Commissioner to hear the testimony and make recommendations to the Missouri Supreme Court. The printed report of said Special Commissioner consisting of 208 pages is filed herewith. The opinion of the Supreme Court of Missouri, *en Banc*, is reported in 347 S.W.2d 91, and is set out as Exhibit B at pages A18 to A59 inclusive of the Appendix attached hereto.

(b) JURISDICTION.

(i) The opinion and judgment of the Supreme Court of Missouri, *en Banc*, was entered on May 8, 1961. (ii) A motion for Judgment of Acquittal or for a rehearing was timely filed by this Petitioner was denied on June 12, 1961. The Supreme Court of the State of Missouri, *en Banc*, is the highest Court of Appellate Jurisdiction in the State of Missouri. Missouri Constitution, 1945, Article V, Sections 2 and 7. Petitioner has no further remedy by appellate review in the State Courts of Missouri.

An order was entered on June 26, 1961, by the Supreme Court of Missouri, *en Banc*, staying all further proceedings in that Court for a period of 90 days from June 12, 1961, to enable Petitioner to apply to this Court for a Writ of Certiorari herein.

(iii) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * *."

Jurisdiction of this court is likewise invoked on the ground, The State of Missouri, through its Supreme Court has abridged his privileges and immunities as a citizen of the United States, deprived him of property rights, his right to freedom of speech, and of his right of association and confrontation of witnesses without due process of law and denied him the equal protection of the law in violation of the First, Sixth and Fourteenth Amendments to the Constitution of the United States, Section 1.

The following cases are believed to sustain the jurisdiction of this Court:

Konigsberg v. *State Bar of California,* 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810;

Schware v. *Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796;

Cohen v. *Hurley,* 81 S. Ct. 954 (Not yet officially reported);

Greene v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377;

Shelley v. *Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161;

Bates v. *City of Little Rock,* 361 U.S. 516, 80 S. Ct. 412.

(c) THE QUESTIONS PRESENTED.

Broadly stated, the questions presented are:

1. Does the procedure for disbarment under Rule 5 of the Missouri Supreme Court placing all legislative, executive, prosecuting and judicial functions in such matters in the Supreme Court and providing for its enforcement by an advisory committee consisting of a salaried chairman appointed by the Court and four lawyers appointed by the chairman with the approval of the Court to serve without compensation, which committee is to make investigations and conduct secret hearings, ex parte and otherwise, and clothed with the arbitrary, unbridled, unrestrained and exclusive power to decide which lawyers it will irreparably damage by filing public disbarment proceedings against them in court and which it will not, and after such filing to prosecute them with the aid of outside counsel appointed by the committee to serve without compensation, before a Special Commissioner also appointed by the Court to take the testimony and furnish the Court suggested findings of fact and conclusions of law with recommendations as to the action to be taken (the commissioner being paid from a fund to which the accused is compelled to contribute in advance), thereby placing the Court under great obligation to its said chosen agents serving the court without pay and committing it in advance to approve, uphold and defend them in any action they take, necessarily chilling and preventing the accused from opposing or making an effective adversary defense against the court's chosen agents, who are in law and fact a part of the Court, meet the basic requirements of a fair trial before an impartial tribunal so as to accord the Petitioner that procedural due process and equal protection of the

law required under the Fourteenth Amendment to the Constitution of the United States?

2. Whether in holding Petitioner's license to practice law was a mere privilege and not a property right; that the Missouri Supreme Court exercises inherent unlimited and unrestricted power to disbar Missouri lawyers including petitioner as officers of the Court; in holding that disbarment proceedings are not adversary proceedings and the Court is not bound by the rules of evidence or other safeguards appertaining to court trials, including the statutes of limitation, deprived Petitioner of due process of law and equal protection of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States?

3. Whether in accepting as true *in toto* the statements and testimony of witnesses taken ex parte in secret hearings in so far as it favored the prosecution and rejecting *in toto* and refusing to believe the testimony of the same witnesses when they were later cross-examined by counsel for Petitioner and their testimony tended to show his innocence, the Court deprived Petitioner of his right of confrontation, cross-examination and the right to a fair trial before an impartial tribunal in violation of his rights under the Sixth Amendment to the Constitution of the United States and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

4. Whether, having refused to entertain his petition for protective orders, convicting and punishing Petitioner for defending himself orally and by letter in making true and *bona fide* statements to one or more former clients against false representations directly and indirectly made to his clients by attorneys and investigators for the Supreme Court's Committee and railroad claim agents assist-

ing them in which they told them that this was not a railroad investigation and that Petitioner had beat them out of money in their railroad settlements, did not deprive him of a lawful defense and deny him his freedom of speech and due process of law and equal protection of the law guaranteed him under the First and Fourteenth Amendments to the Constitution of the United States?

5. Whether convicting Petitioner for claimed activities of R. J. McDonald 37 years ago in cases in which Petitioner was not associated and for which Petitioner was not responsible (and concerning which he had no substantial or accurate information) based upon his handling other cases for him as local counsel which were not shown to have been solicited, was a denial of due process of law and freedom of association in violation of the First and Fourteenth Amendments to the Constitution of the United States?

6. Whether by convicting Petitioner:

(a) On acts and conduct on which no charge was made in the information and on which he was not tried and had no opportunity to defend against;

(b) On acts and conduct not theretofore made a ground or cause, by rule or otherwise, for discipline, but being both permitted by a special Missouri Statute and specifically approved as entirely ethical and proper by Missouri Appellate Courts, including the Supreme Court;

(c) On claimed testimony not given before the Special Commissioner or put in evidence in the record on which Petitioner was tried, but which said Commissioner went outside the record to get in violation of the agenda ordered by him to be followed, agreed to by the parties, and which he ruled would be strictly adhered to;

(d) On supposed unsworn statements claimed to have been made out of court and not in Petitioner's presence or hearing to witnesses who testified to such supposed statements and which testimony was received for the limited purpose as tending to contradict certain statements made on the stand by such persons credited to have made such statements out of court, but which was accepted as substantive proof, in violation of the rules of evidence;

The court did not deny him due process of law and equal protection of the law and the right to be informed of the charges against him under the Sixth and Fourteenth Amendments to the Constitution of the United States?

7. Whether by convicting Petitioner upon evidence which was insufficient to prove his guilt the Court deprived him of due process and equal protection of the law, in that:

(a) The evidence overwhelmingly proved his innocence;

(b) The Court did not sustain its heavy burden of proof in such cases under its decisions;

(c) Neither the evidence nor reasonable inferences therefrom was sufficient to prove his guilt;

(d) The evidence relied on was as consistent with innocence as with guilt;

(e) The Court ignored and failed to follow applicable rules and principles of law laid down by the Court which required a finding of his innocence, to-wit: I. That the shown and admitted good reputation of Petitioner for truth and ethical conduct could not be upset by the testimony of unscrupulous and disgruntled clients who were thoroughly impeached and discredited and shown to have

ulterior motives to injure him, being the only testimony against him;

(f) The action of the Court was discriminatory as selecting petitioner for punishment and failing to prosecute others shown to be guilty of the offenses with which petitioner was charged;

The Court deprived him of due process of law and the equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution.

(d) THE CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED.

Missouri Constitution, 1945, Article V, Section 5, provides:

> "§5. Rules of practice and procedure—duty of supreme court—power of legislature.
>
> "Section 5. The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Section 477.010, R.S. Mo., 1949, provides:

> "477.010. Supreme court to promulgate general rules for all courts of the state.
>
> "The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms

or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being. (L. 1943, p. 353, § 10)."

Section 506.030, R.S. Mo., 1949, provides:

"506.030. Power of supreme court to promulgate rules to harmonize code.

"If any part of this code shall be found to be in conflict or discordant with other parts of this code or with other statutes relating to civil procedure, the supreme court shall have power to promulgate rules necessary to harmonize the same so as to promote the orderly administration of justice. No such rule shall abridge, enlarge or modify the substantive rights of any litigant. Such rules shall be effective until superseded by legislative enactment (L. 1943, p. 353, § 10)."

Supreme Court of Missouri Rules 4, 5, and 6 (occupying the same status as statutes of the State and set out in the Appendix hereto as Exhibit G, pp. A86-A101), are here drawn in question on the grounds of their being repugnant to the Constitution of the United States, and especially the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, providing:

"AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article II, Sec. 1, Missouri Constitution, 1945 (Vernon's Annotated Statutes, Vol. 1, p. 672):

> "§ 1. *Three departments of government—separation of powers.*
>
> Section 1. The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

Jurisdiction of this Court is likewise invoked on the ground the State of Missouri, through its Supreme Court had deprived him of his right to be informed of the nature and cause of the accusation and of confrontation of witnesses in violation of his rights under the Sixth Amendment to the Constitution of the United States, providing:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Jurisdiction of this Court is likewise invoked on the ground that he has been denied his right of free speech (including right of association) in violation of the First Amendment to the Constitution of the United States, providing:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or of abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(e) STATEMENT OF FACTS.

I. Procedural History of the Case.

Preceding the filing of charges against Petitioner, the Missouri Supreme Court's Advisory Committee made a secret investigation, took statements and held secret hearings at which they took *ex parte* testimony later written up for their files.

The charges against Petitioner in the Information (Exhibit A, Appendix hereto) were based on the Rules of the Supreme Court of Missouri, and filed directly in that court as a court of original jurisdiction, and so far as material were:

That Randolph developed and followed a scheme to conceal the solicitation of F.E.L.A. cases and the solicitor's remuneration; that Randolph followed this practice after having been warned by the Supreme Court's Advisory Committee in 1946; that he employed and used solicitors to obtain F.E.L.A. cases in violation of Rules 4.28, 4.11, and 4.47; that he split his fees with solicitors in F.E.L.A. cases in violation of Rule 4.31; that he failed to advise clients of the claimed questionable nature of transactions with solicitors, in violation of Rule 4.31 (Information, Exhibit A, Appx. pp. A1-A17; Comm. Rep. pp. 1, 2; Opinion Missouri Supreme Court, Exhibit B, Appx. p. A18). Said rules are set out in the Appendix hereto as Exhibit G, pages A86 to A101.

Following the institution of the action the Missouri Supreme Court appointed a member of its Bar, Robert V. Niedner, Special Commissioner to conduct hearings, take the testimony and report to the Court with recommendations as to the action to be taken (Opinion, p. 1). Petitioner then was ordered by the Court to put up a deposit for costs for his own prosecution as a condition precedent to obtaining a hearing before the Commissioner and later the Court. At the command of the Court, Petitioner deposited for costs of his prosecution the sum of Six Thousand Five Hundred ($6,500.00) Dollars prior to the Commissioner's report (Comm. Rep. 207).

The Special Commissioner held many hearings and submitted to the Court a Report which is printed and contains 208 pages, a copy of which is filed herewith. The Commissioner found the charge Petitioner employed solicitors was not proven but that he did knowingly accept business which had been solicited by laymen (Comm. Rep. 201); that he did not dissipate the funds of clients by paying investigators who rendered no service as charged, because the Commissioner did not believe the client's funds were used to pay the solicitors; besides he found that the investigators did conduct investigations (Comm. Rep. 203, 185). The Commissioner recommended that Petitioner's license to practice law be suspended for one year (Comm. Rep. 208).

In accordance with the practice in such cases in the Supreme Court of Missouri, counsel for Informants then prepared and filed a printed brief in the Missouri Supreme Court to which Petitioner answered with his printed Respondent's Brief, which performs the function of exceptions to the recommended findings of fact and conclusions of law contained in the Commissioner's Report (Opinion, p. 2, Rule 5.11).

Following oral arguments the Court took the case under advisement and on May 8, 1961, handed down an opinion and rendered judgment in which it adopted the Commissioner's findings, also finding that Petitioner had divided his fees with lay solicitors and followed a scheme to conceal such solicitation (Opinion, p. 27); that in his letters and statements to a former client made in an effort to defend himself against the activities of attorneys and investigators for the Court's Bar Committee and railroad claim agents assisting them, he criticized the conduct and representations of agencies of the Missouri Supreme Court and accused them of being connected with railroads, and should be punished for having the courage to fight back and resist the Court's agencies (Opinion, pp. 27-33, 37), and ordered permanent disbarment of Petitioner.

In due time thereafter Petitioner filed in said Court his Motion for Judgment of Acquittal or for Rehearing, which the Court denied on June 12, 1961. Said motion is set out in the Appendix hereto as Exhibit C, at pp. A60-A65. Petitioner has no further remedy for appellate review in the state courts of Missouri.

Upon application of Petitioner the Supreme Court of Missouri entered an order on June 26, 1961, staying all further proceedings in that Court for a period of ninety days from June 12, 1961, to permit Petitioner to apply to this Court for a Writ of Certiorari herein, a copy of said order is set out in the appendix as Exhibit D, at page A72.

The Constitutional questions raised and the method and manner of raising them is set forth under section (d) of this brief, *supra*, and in Exhibit F of Appendix pp. A74-A78.

II. The Facts Material to the Questions Presented.

Petitioner was duly licensed to practice law by the Supreme Court of Missouri in 1918 after previously receiving his college and law degrees at the University of Kansas. He has since practiced his profession in the Missouri Courts and the various Federal Courts, including this Court (Comm. Rep. 15. 16, 8-1843, 1845).

Until the institution of this proceeding his integrity, professional ethics and good character had never been questioned. Testifying to his good character and high standing at the bar for veracity, integrity, ability and ethical conduct before the Commissioner were: Mr. Justice Charles E. Whittaker of this Court (3-579-594); United States District Judge Albert L. Reeves, retired (Ex. 32-1, 11-2960-2962); The Honorable Floyd R. Gibson a former State Senator from Kansas City whom President Kennedy recently appointed as a District Judge for the Western District of Missouri (Ex. 32-8); Judge James W. Broaddus (11-2964-2966) and Judge Elmo B. Hunter (11-2971-2974) of the Kansas City Court of Appeals; Judge Paul A. Buzard (11-2974-2976); Judge John R. James; Judge Ben Terte (Exs. 32-5 and 32-2) and Judge Tom J. Stubbs (11-2958-2962) of the Circuit Court of Jackson County, Missouri; Honorable John B. Gage, former Mayor of Kansas City, Missouri, for three terms (11-3047-3049); Honorable Charles L. Carr, former President of the Missouri State Bar, Integrated (11-2966-2968); Honorable Lowell L. Knipmeyer, President of the Kansas City Bar Association (11-2968-2971) and other distinguished lawyers. For many years he was rated A. V. in Martindale-Hubbell Law Directory (8-1899).

In 1921 Petitioner was employed by a widow named Willgues to bring an action under the Federal Employers'

Liability Act for the wrongful death of her husband against the Pennsylvania Railroad Company, a non-resident corporation, having no line or business office in the State of Missouri. Randolph obtained service by attaching 500 boxcars of that railroad in the yards in Kansas City. The case was given wide publicity locally and in the middle west and led to his employment in a number of cases, particularly by lawyers and firms specializing in handling cases under the Federal Employers Liability Act (Opinion p. 4. Ex. 31-1; Comm. Rep. 16, 8-1859). He made a special study of the law and procedure under F.E.L.A. and became an expert in that highly specialized field, and in addition to cases in which he was hired directly was called into consultation and employed in such cases also by other lawyers and law firms who did not specialize in F.E.L.A. cases (Comm. Rep. 16, 152, 8-1854, 1859, 3-583-85).

From representations by such specialist firms that handled such cases in sufficient volume to have their own investigation setup and later verified by actually figuring it out for himself in some cases, Petitioner learned that it was generally accepted by such lawyers that it cost approximately from one-fourth to one-third, nearer one-third of the lawyer's fee to have such cases investigated (Comm. Rep. 21, 8-1863-1879; 8-1920, 1923, 1925-27, 1954-75, 1892, 1926-27, Ex. 54-67, 8-1969 *et seq.*). This fact was reflected in his employment arrangement by such firms, whereby he received only one-third of the fee and forwarded two-thirds to the other lawyers to cover their fee and the cost of investigation (Comm. Rep. 21, 8-1863-1879). Among others he handled cases for McDonald of Minneapolis on that basis (Comm. Rep. 21, 8-1863).

Contrary to the statement in the Court's opinion at page 9 Petitioner did not know that McDonald in any instance paid his investigator one-third of his attorney's

fee He was told by him and others only that total investigation expense approximated one-third of the fee (5-1085, 8-1892; 10-2665-67). Part of the expense might well have been for travel, other investigators, photographs or many other items.

His first introduction to such cases from New Mexico was in handling some of them in the Missouri Courts for McDonald who was filing in Chicago cases which had originated in New Mexico (Comm. Rep. 31, 32; 8-1854, 1858-1860). McDonald occasionally referred a case to Petitioner from New Mexico which he did not regard as of sufficient moment to file in Chicago, or for other reasons he did not care to handle (Comm. Rep. 32). He also employed him as in other cases in some cases from New Mexico (10-2636; 8-1877). Randolph took depositions in New Mexico, and handled these cases with marked success and the word got around in New Mexico among railroad employees who are naturally clannish (6-1295). Later McDonald sickened and died (4-974). By that time Petitioner was well enough known in New Mexico to attract some of the business direct.

Claimants under F.E.L.A. in the State of New Mexico were for various reasons unable to obtain adequate settlements or awards in that State and for many years had been employing out of state lawyers specializing in that field to bring actions in foreign states where better results could be obtained (Comm. Rep. 20, 6-1408-09, 6-1317; 10-2712). In one case a United States District Judge for the Western District of Missouri, Judge Richard M. Duncan, sustained the claim based upon the proof made that a fair trial could not be had in the Courts of New Mexico and refused to grant a motion of the Santa Fe Railroad to transfer the case back to New Mexico on the ground of *forum non*

conveniens under Sec. 1404 (a), Tit. 28, U.S.C.A. (1-212, 214).

In each instance in which he was employed direct and was not recommended by McDonald the client first personally contacted Petitioner either going to Kansas City to see him or by letter or long distance telephone making an appointment to see him (8-1902, 1906). After going over the facts with them he told them what fee he would charge.

Ever since 1940 Petitioner practiced alone in Kansas City some 900 miles from the scenes of many of the New Mexico F.E.L.A. cases and not having an investigator in his employ, although stating he would make the investigation if the clients insisted yet he told them he preferred not to and encouraged his clients to hire independent investigators locally (Comm. Rep. 20, 21; 8-1909-10, 1913, 1916; 10-2572-73; 8-1935-36, 1914; 8-863; 5-1083-85). Based on his aforesaid experience with firms providing their own investigation he told them he would knock off one-third of the indicated fee if the client would employ and pay his own investigator (8-2481, 10-2666, 2669). He told them if they could save anything out of the third he was knocking off in having their own investigator that was up to them (8-2481). Regarding the investigation a part of the lawyer's work, the clients usually did not agree immediately to do this, preferring to contract on the basis that Petitioner do everything for the larger fee, and the contracts were usually made and signed initially on that basis. About three-fourths of Petitioner's practice was in the defense of insurance, Oil and Steel companies and other corporate clients (8-1897-98), making it difficult for him to be away from his office for the extended periods required to make these investigations at such distances. He therefore pointed out all the advantages both to the

clients and to himself incident to hiring their own investigators locally. Their lay minds had to be convinced that the investigation was not legal work and could be done as well and even better and at less expense by laymen. It involved salesmanship and all legitimate psychology thereof, including the desire of every litigant to settle his case without a trial and thus avoid long and interminable litigation (7-1804-09, 6-1294-96, 8-2085, 2089). They would usually have to think the matter over awhile during the two or three days they were in Kansas City before they would agree to give serious consideration to hiring the investigator (10-2677). When they did so agree the appropriate notations and interlineations were made in their presence on the contracts they had previously signed to fit whichever alternative they ultimately followed (7-1805; 6-1468-70). In no case did Petitioner recommend an investigator and in no case did he ever contact an investigator before the client had employed his own investigator (5-1079-1097). In no case did he ever tell a client what percentage to pay an investigator (2-518, 519; 5-1079; 6-1409-10, 1376; 7-1666-69). In the later cases injured men learned from former clients that Petitioner would knock off one-third of his fee if the client would hire his own investigator and that the investigator had undertaken to investigate for the amount Petitioner knocked off (5-1073 *et seq.*; 5-1066; 5-1078, 1077). In these cases the clients, after conferring with the investigator, signed a contract providing for the lower fee and a separate memo to the effect that his investigator would investigate for him for the third knocked off (Exs. 10-26, 27, 11-22, 23; 18-14, 15; 31-33, 34).

As the injured clients were unable to work, burdened with medical bills and unable to pay cash they could not hire either a lawer or an investigator except on a

contingent basis (5-1186, 1236, 1243, 6-1323, 1400, 1434; 7-1822, Comm. Rep. 125-126).

In refutation of the charge that the reward for recommending Petitioner was employment as investigator we submit the names of persons who recommended Petitioner to clients who were not hired to investigate their cases and who received nothing.

Persons shown to have recommended Petitioner to clients in cases involved in the charges but who were not employed to investigate such cases and were not otherwise compensated were:

1. Mears recommended him to Hice (6-1549, Ex. 16-21), Taylor (6-1553, Ex. 3-11a), Bell (6-1554, Ex. 5-11), Beck (6-1550, 1552).

2. McDonald or his estate recommended him to C. C. Jennings (8-1893, 2237, Exs. 19-14, 14a), Hunnicutt (6-1292), E. E. Jennings (7-1590), Alice Francis (8-2144), Mears (6-1522, Ex. 16-25), Mrs. Jarboe (4-954, 955, Ex. 24-1).

3. Joe Ross recommended him to Mrs. Williams (Ex. 4-10), Beck (6-1402, Ex. 10-30), Goodner (7-1664).

4. Leonard Stevenson and Mr. Bryant recommended him to Bouse (11-2982).

5. Marie Francis recommended him to Brinker and Simmons (7-1799, 1800, 1801).

6. Hunnicutt recommended him to Beck (6-1405), Thomas (6-1323, 1350).

7. Hice recommended him to Beck (6-1405, Ex. 10-30).

8. C. C. Jennings recommended him to Hunnicutt (6-1292, Ex. 14-18).

9. A Belen conductor recommended him to Dunham (6-1461, Ex. 7-13).

10. K. C. Terminal fellow employee recommended him to Whinery (5-1178, 1171).

11. A fellow employee recommended him to Harris (5-1228).

12. "Chicken" White recommended him to Deason (1-110, 122).

13. Cortner and Frazier recommended him to Tuggle (4-893).

14. Tuggle and Carignan. Smith recommended Roy Williams, a local Boonville lawyer, as well as Petitioner, to Carignan (4-624).

As the cases were settled Petitioner had his clients come to Kansas City, sign the release papers and endorse the railroad check. He then settled with the client, giving him his personal check for the amount remaining after taking out his fee and such case expense as he had personally paid, accompanied the client to his bank where the client would sign a requisition for two cashier's checks, one to the investigator for his fee and the other to the client for his part of the settlement (Comm. Rep. 25-28). This was testified to unequivocally by Petitioner and many former clients (Whinery, 5-1181-82; Harris 5-1240; Hunnicutt, 6-1320; Thomas 6-1375, Beck 6-1423-26; Dunham 6-1486-87; Mears, 1547-48; E. E. Jennings 7-1622-23; Goodner 7-1684-1687; Brinker 7-1820-21; Jarboe 4-996-997; Bouse 11-3001, 3003). In no case was the investigator present at the settlement and his pay had to be forwarded to him.

All cases, as testified by thirteen clients and shown by the Exhibits, were adequately investigated by the investigator hired (2-482-83; 8-2221). Petitioner was very

successful in handling these cases and obtained excellent results for his clients. All his clients were satisfied and none was making complaint of any kind (8-2219, Comm. Rep. 22; 10-2620; 11-2727, 2827). Petitioner always accepted the lesser fee mentioned in his contract and it is agreed his clients were paid all they had coming under any view of the contract (Informant's printed brief in Mo. Sup. Ct. p. 7).

In an effort to prevent railroad employees injured in F.E.L.A. cases in New Mexico from employing out-of-state lawyers expert in that field to bring suit in other jurisdictions where more adequate awards could be obtained the Santa Fe Railroad conducted an investigation of Petitioner's cases brought under F.E.L.A., took false affidavits (Ex. 31-67, p. 25), which it lodged with the Missouri Supreme Court's Advisory Committee, together with a complaint against Petitioner, which became the vehicle of the charges, investigation and prosecution herein (Opinion 32, 33, Comm. Rep. 12, 13, 11-2890). The American Association of Railroads, Claims Research Bureau, largely through the Santa Fe, was active behind the scenes throughout the proceedings in sending investigators around to interview Petitioner's former clients and prejudicing them against Petitioner by suggesting he had overreached them (10-2620; 1-48; 11-2725; 11-2932-33-34, 2797, Ex. 31-72, Exs. 10-30, 14-18, Comm. Rep. 12, 13, 14, 149). It was admitted the charges against Randolph came from the Santa Fe Railroad (Opinion 32; Comm. Rep. 13; 11-2890, 2933-34).

The general chairman of the Missouri Supreme Court Bar Committee is appointed by the Supreme Court. Rule 5.13. The Advisory Committee (with state-wide jurisdiction) consists of the General Chairman and four lawyers appointed by him with the approval of the Supreme Court.

Rule 5.14. The General Chairman, like the judges of the Court is on a salary and is in charge of the Court's Department for disciplining Missouri lawyers. The members of the Advisory Committee, except the General Chairman, serve without compensation. Rule 5.21. The members of the committee are authorized to make investigations, take testimony, ex parte or otherwise, all secret and behind closed doors, and are given the sole, exclusive, and unrestrained power to decide, also in secret, either for valid reasons or for abitrary or capricious reasons, which lawyers they will or will not disgrace and irreparably injure by filing against them publicly in court disbarment proceedings (Rules 5.03, 5.17), and when they file the charges in court the committee or a designated member thereof shall become the prosecutor unless the committee designates outside counsel to represent the committee (Rule 5.06, Rule 5.03, Rule 5.09). There is no provision in the Rule for compensation for outside counsel designated for the committee and such counsel usually serves without compensation. The practice, as here, is for the Supreme Court to appoint a Special Commissioner to take the testimony and make recommended findings of fact and conclusions of law to the court. The accused, as here, is required to make deposits in advance as ordered by the Supreme Court for payment of the expenses of his trial before the Commissioner as a condition precedent to having a trial.

The Supreme Court has assumed complete control of the investigation, prosecution and final decision of all disciplinary proceedings against attorneys in Missouri. It exercises all legislative, executive and judicial functions as a complete monopoly. When a case reaches the Supreme Court for final decision the court is thus faced with the questions of deciding whether this arm of the Court

used good judgment in exercising its purely discretionary powers to the ruin of the lawyer and whether it will or will not uphold the acts of its Advisory Committee, prosecutors and Special Commissioner, which essentially becomes the question will it uphold itself. Quite aside from this question, the Court must necessarily feel a deep sense of appreciation and loyality, if not obligation to the members of its committees and the counsel who prosecute for it presumably without compensation. The investigating and prosecuting agencies are part and parcel of the Supreme Court itself which performs the final judicial act in the proceedings. We believe this procedure followed in Missouri, and here, particularly ever since the Court itself about 30 years ago took over from voluntary grievance committees of independent bar associations the function of investigating their members and instituting and prosecuting such proceedings, violates the minimum standard permissible to afford due process of law and equal protection of the law broadly recognized and implemented by the Fourteenth Amendment to the United States Constitution. Only one lawyer of the many disbarment cases has been acquitted of charges brought under this set-up since its inception so far as we can discover.

At first the Supreme Court's Committee conducted herein a secret investigation, took *ex parte* statements and testimony of witnesses *ex parte* (Comm. Rep. 14). The attorneys and investigators for the committee as the customary preliminary on approaching a former client of Petitioner would advise him they did not represent any railroads, that this was not a railroad investigation but an investigation by the Supreme Court of Missouri (11-2928-29-35; Comm. Rep. 13, 14). At that time Martindale-Hubbell listed Mr. Thompson, chief attorney for the Committee, as representing three railroads (11-2788-89, 11-

2931, Comm. Rep. 13), Mr. Ross, associate counsel for the committee as representing one railroad (11-2789) and Judge Reeves, a member of the Supreme Court's Committee as representing one railroad (11-2789). Also the railroads not only preferred the charges originally but were active throughout in the investigation of Petitioner (Opinion 32, Comm. Rep. 12, 13, 14).

Such attorneys and investigators would then show the client photostatic copies of the checks and cashier's checks used in settlement of his case against the railroad (11-2923-26, 4-907) and tell him outright or suggest to him that Petitioner's check for the amount due the client out of which the client had paid his investigator was the amount the client should have received for himself as his net share (1-161-164; 1-51, 4-908, 925-26, 873; 9-162; 10-2627, 2620, 11-2925, 2797, Ex. 31-72).

In this manner the attorneys and investigators for the Supreme Court's Committee succeeding in inducing a few of Petitioner's former clients either to believe he had "beat" them out of some money or to conclude there was an opportunity for blackmail and got them to turn against him and work with them in the hope of getting money from him (11-2798). Among those so influenced were: Hice (1-51); Tuggle (4-873); Carignan (4-745, 928-30, 678-80), and Deason (9-162). After carefully instilling in the former client's mind the idea he had been cheated, lawyers for the Court's Committee claimed to have "backed away" but did not try to disillusion them (11-2925-27). However, they admitted in this proceeding that the clients in every case got all they were entitled to under their contracts (Informant's printed brief in Mo. Sup. Ct. p. 7; Comm. Rep. 202, 203). The details are set out under our individual analysis of the testimony concerning these witnesses following this Statement of Facts.

The activities of the attorneys and investigators for the Supreme Court's Committee and the railroad claim agents in the above respects was brought to Petitioner's attention when former clients began making demands on him for money claiming they had been overreached in making their settlements (10-2620, 2628-29; 11-2798, Comm. Rep. 31).

Upon learning of such concerted activities on the part of the representatives of the Missouri Supreme Court and the railroad claim agents, Petitioner on May 19, 1954, attempted to file a Petition in the Missouri Supreme Court in which he charged under oath various of the foregoing misrepresentations, ruses and artifices being employed by or on behalf of its committee and its representatives and praying the Court's protection against such activities (11-2912, Ex. 31-67; 11-2753, 2760). The Missouri Supreme Court even refused to permit it to be filed, much less grant a hearing and give any relief in the matter. Being unable to get any consideration from the Court, Petitioner was forced to protect himself as best he could.

In self defense against such concerted activities Petitioner wrote letters and interviewed and had others interview certain former clients, a Mrs. Mayhon in particular, to prevent them being misled (10-2620; 11-2798; 10-2628; Opinion 27-33). The Record, as well as the Admissions in Mr. Thompson's deposition (11-2873, 2884, 2886, 2928), shows the facts stated by Petitioner in such letters were in all respects true. The Record clearly shows this was a railroad investigation in which the railroads were out to get Petitioner. The attorneys, investigators and claim agents were misrepresenting the facts and deceiving his former clients, in the manner above set forth. The Supreme Court's Committee and the New Mexico Bar were working together as evidenced by the help given the prose

cution by the New Mexico Bar in investigating the case, consultation and strategy planning together, and also in filing a suit in the New Mexico courts to prohibit Petitioner from accepting cases originating in New Mexico filed shortly after Mr. Thompson for the Supreme Court's Committee addressed a mass meeting of lawyers on the subject in New Mexico (11-2891, 2897-2902, 2910, 2930-31, 2905-2916, Comm. Rep. 16; 11-2754).

During the hearings before the Commissioner both the Commissioner (11-2804) and Mr. Thompson (11-2933) expressed their opinions that Petitioner was justified in taking the action he did in self defense. The Commissioner had a change of mind and criticized Petitioner mildly in his report (Comm. Rep. 198, 199), and the Missouri Supreme Court in its opinion condemns Petitioner unmercifully for defending himself against its Advisory Committee, and the attorneys, investigators and railroad claim agents gathering the evidence for the prosecution, and gives that as one of the main reasons for assessing against him the heaviest punishment in the power of the Court (Opinion 27-32, 37). The opinion in that regard powerfully illustrates the vice and unconstitutionality of the Missouri Supreme Court's system in denying the accused the right to make any effective defense without incurring the wrath of the court as contemptuous of its chosen agents and its otherself whom it has sponsored and feels obligated to defend whatever their conduct may be. In fact, it nowhere in its opinion even mentions any of their activities with which the record is replete.

The statement in Petitioner's brief that Hice was the only former client who testified his case was solicited was challenged by the Court in its opinion (Opinion pp. 12 to 24) by selecting out of that list the names of Carignan, Tuggle, Deason and Bouse (Opinion 12) and attempting

to demonstrate they did also so testify. Petitioner challenges the Court's construction of that evidence.

Under section III following we have briefly summarized the testimony of each of said witnesses separately to show the evidence will not reasonably bear the construction put upon it by the Missouri Supreme Court; that the Court has not been fair in its analysis, and its conclusions thereon are colored for the perfectly obvious purpose to defendant its agents to the limit against shown and admitted acts which cannot be condoned, and to down grade unjustifiedly, and punish Petitioner to the limit of its power for having the temerity to expose such acts and to take appropriate action to resist them and defend himself in the only way left to him when the Court refused to protect him.

While giving lip service to the rule that Petitioner's good character was strong legal proof of his innocence and entitled to great weight (Opinion 3; Comm. Rep. 204, 166, 152); that a number of former clients testified they employed their own investigators and their cases were not solicited (Opinion 34); that the witnesses testifying against Petitioner and in support of the charges "were to some extent impeached and contradicted" (Opinion 35), yet the Court deliberately and in all cases accepted as true, not only the testimony of said impeached witnesses, but also accepted the secret *ex parte* statements and testimony of witnesses when first approached, frequently not under oath, about matters occurring a number of years before, and disbelieving their later testimony under oath after having their recollections refreshed when they testified later in a formal proceeding where Petitioner had a right to cross-examine (Opinion 34, 33; Comm. Rep. pp. 199, 204, 205, 206, adopted by the Missouri Supreme Court, Opinion 24, 36).

Illustrative of the attitude of the Court as above described is the election of the Commissioner (Comm. Rep. 173, 174, 196) and the Court (Opinion pp. 21-24) to disbelieve the testimony of Petitioner with his good reputation and accept at full value the testimony of Deason, contrary to his affidavit, who was trying to blackmail Petitioner into paying him $2,500.00 to testify for him under the threat that otherwise he would testify for the Supreme Court's Committee (Comm. Rep. 196, 154; Opinion 18-20). Petitioner refused to submit to blackmail and Deason testified for the Supreme Court Committee. The same is true of Carignan, Tuggle and Hice. See summary of the testimony of Deason, his son, Carignan, Tuggle and Hice under the Subsection of this Petition next following.

The Commissioner (Comm. Rep. 154, 173, 196) and the Court (Opinion 16-18) likewise accepted at full value the testimony of Tuggle in preference to that of Petitioner although Tuggle was trying to blackmail Petitioner and his own investigator, into giving him $1,800.00 so he could apply the money on his indebtedness to a bank growing out of forged notes he had negotiated (4-135, 136, 925-26, 872, 834, 838, 870, 9-2363, 2369-70, 2392, 2397-98, 2405-06, 2415).

Association with McDonald.

From about 1922 until 1931 Randolph, while practicing alone, handled at Kansas City as local counsel such cases for McDonald's firm as were referred to him (8-1860, 1890, Comm. Rep. 31). During that period Randolph participated in about half a dozen cases for the McDonald firm of Minneapolis, Minnesota, and there was nothing in any of the files suggesting any impropriety (8-1862, 10-2650, Comm. Rep. 31). From about 1931 to 1940, Randolph was a member of a firm handling largely corporate defendant's

litigation, during which time McDonald referred no cases to him (8-1884, 1883; Comm. Rep. 31).

About 1937, someone, presumably McDonald's office, sent Randolph a copy of a Minnesota newspaper (Ex. 31-29, 8-1882) which reported an investigation of McDonald and a Commissioner's report praising him and acquitting him of charges of misconduct that had been filed against him (8-1882, 10-2657, Comm. Rep. 31-32).

About a year later Randolph heard that the Commissioner's Report referred to in the newspaper article had been reversed by the Minnesota Supreme Court. He was receiving no business from McDonald at the time, had been out of touch with him many years, and says he paid very little attention to it (8-1883, 1884, 10-2657). Randolph heard indirectly McDonald was in the moving picture producing business on the West Coast (10-2661). About 1940 he heard McDonald had resumed the practice in Minnesota (8-1884-1886, 10-2661, Comm. Rep. 32).

The judgment disbarring McDonald in Minnesota was entered on December 9, 1938 (204 Minn. 330, 294 N.W. 461). On October 8, 1940, McDonald was conclusively found to have changed his attitude and that he was a fit person to practice law and he was reinstated as a lawyer (208 Minn. 330, 294 N.W. 461).

In 1940 Randolph's firm was dissolved and he again established his own office (8-1884, 1885-86, 10-2661, Comm. Rep. 32). Since these proceedings were instituted against Randolph he for the first time hunted up the opinion of the Supreme Court of Minnesota and read it (8-1884, 1885, 10-, 2661, 2656).

Randolph testified that in about 1942, McDonald again started referring cases to him (8-1887, 10-2657-58); that in 1945 McDonald and DeParcq were appointed regional coun-

sel for the Brotherhood of Railway Trainmen and Randolph declined to associate with them in those cases (8-1887) because the kickback to the Brotherhood constituted splitting fees with laymen (8-1888). Randolph's testimony was supported by correspondence (Exs. 31-30, 31-31; 8-1901).

Randolph has not been charged with misconduct in any case, either in connection or cooperation with McDonald or other person, either lawyer or layman, or in any of the cases where Randolph received only a percentage of the fee and did not have anything to do with paying for investigation or assisting the client in getting a cashier's check to pay the investigator.

In the case of *In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825, 67 A.L.R. 2d 827, cited in the Missouri Supreme Court Opinion herein, the Court said as to Heirich (l.c. 834):

> "The attacks upon McDonald's reputation, which are not conclusively supported by the evidence, cannot be attributed to respondent by association. In acting as local counsel for McDonald, as lucrative as that association might have been, respondent was not violating the ethics of his profession."

In condemning Randolph (Opinion pp. 8, 9, 10, 11) because of his association in litigation with McDonald after McDonald had been reinstated by the Supreme Court of Minnesota as a person qualified and fit to practice law the Missouri Supreme Court abridged and denied his indispensable liberty of association in violation of his Constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. *National Ass'n for A. of C. P.* v. *State of Alabama*, 357 U.S. 449, 78 S. Ct. 1163.

Alleged Warning.

The finding of the Court that Randolph was warned by the Bar Committee when he was called before it on July 12, 1946 (Opinion 11, 12 and 33) is not supported by substantial evidence.

The letter to Randolph to appear as a "witness" before the Bar Committee bore only a number, no name (9-2437-38). He was not told that the Bar Committee was investigating him and did not know he was the subject of the investigation (Ex. 31-38, 10-2643, 2648-51). He was told both in the letter and at the hearing the Committee was investigating only outstate lawyers taking business out of Missouri and especially DeParcq (Ex. 31-38, p. 2, 10-2648-49-50-51-52-53-54, 9-2438-39). He was told the Committee was not charging anybody with anything (10-2647, 2652, Ex. 31-38, pp. 17-18). In the course of questioning the name of McDonald and other lawyers came up and Randolph was asked about McDonald apparently only incidentally (Ex. 31-38, pp. 3-7).

At that time Randolph had only one case pending which had been sent him either by McDonald or DeParcq, a wrongful death case that occurred in San Francisco and was against TWA (Ex. 31-38, p. 6). The suit was refiled in Kansas City as a jurisdictional protective matter only and later dismissed (31-38, pp. 6-7). The only case Randolph accepted employment in after the conference with the Bar Committee on July 12, 1946 (Comm. Rep. 5), in which McDonald recommended Randolph or the client hired Randolph because McDonald refused to take the case was the Jarboe case with which Fenn was not connected (4-2294). Randolph testified that if he had been employing solicitors or chasing cases in 1946 when he appeared before the committee, he might have considered the questions and statements of the Committee appplied

equally to him and taken it as a warning, but in view of the letter he had received, and his consciousness of innocence of the practices being criticized, he did not think the committee was investigating him (Comm. Rep. 12, 10-2652, 2647-54).

The Missouri Supreme Court puts emphasis on the fact that in December, 1924, in a case pending in the Circuit Court of Jackson County, Missouri, at Independence in which Randolph was associated with McDonald upon motion of defense counsel, McDonald was barred from trying the case and Randolph was required to try the case (Opinion 8, 9). The facts were: that defense counsel cited two opinions of Judge McGee of the U. S. District Court in Minnesota in which McDonald was criticized and the clerk was instructed to transmit a record of the case to the State Board of Bar Examiners.

Shortly after the Court at Independence had barred McDonald from appearing in the case mentioned, Randolph learned that Judge McGee, author of the Minnesota opinions, which were the basis for barring McDonald from participation in the case had been caught accepting bribes and while somebody from the Department of Justice was waiting in the court room to see him Judge McGee went into his private chambers and blew his brains out. After hearing this Randolph disregarded his reported criticism (Ex. 31-38, p. 13).

Volume 4 F.2d P. VIII, note 16, states: "Judge McGee died February 15, 1925."

He further testified that the first time he knew of any contention that he had solicited cases was on or about February 5, 1953, when he received notice of the first formal hearing of the Court's Advisory Committee (9-2436-37). When he was told in September, 1953, he had been

previously warned he requested a transcript of his testimony before the Advisory Committee on July 12, 1946, and when he received it learned for the first time that the number of the original letter requesting his attendance had been assigned to him and was the same as that on the formal notice (9-2437-38).

Randolph has refused to accept employment from Santa Fe employees in New Mexico since April, 1952, principally because his true relations with Fenn were being misinterpreted by the Santa Fe and the New Mexico Bar (Ex. 31-67).

Misrepresentations.

In the Tuggle case, after informing Tuggle on February 20, 1955, they did not represent any railroad and this was not a railroad investigation, Mr. Thompson and Mr. Ross showed him photostatic copies of the check and cashier's checks used in the settlement of his case against the railroad (11-2925-23, 4-907).

Mr. Thompson testified he and Ross asked him if he had any recollection (his case was settled June 8, 1948, nearly seven years before) whether he had employed Smith as investigator and what fee arrangements he had with Randolph with reference to fees (11-2925). That Tuggle became angry and said he thought Randolph had beat him out of some money (11-2925), and asked Mr. Thompson and Mr. Ross if he, Tuggle, could get his money back and they informed him that was no concern of the Bar Committee, "that was something that would have to be determined by the Courts" and asked him to hold off until the hearings were over in this proceeding (11-2925-26). Mr. Thompson testified in making such investigation they ran into some cases where sometimes clients registered some indignation which created a delicate situ-

ation for counsel, that when such situations arise "we attempt to back off of that." (11-2927).

According to Mr. Thompson's testimony, neither he nor Mr. Ross made any attempt to disillusion Tuggle (11-2925-2926), although he was later forced to admit every one of Randolph's clients got all that was due him under any construction of the contracts (Original printed brief of Informants in Supreme Court of Missouri, p. 7).

Deason testified that Mr. Thompson and Mr. Ross showed him Randolph's settlement check for $13,000.00, which was his share before paying his investigator and told him that appeared to be the amount he should have received (1-162-164).

Two or three men called at the home of a former client of Randolph's, named Taylor, in Dallas, Texas, claiming they were investigating Randolph on behalf of the Bar Committee; that they found that Randolph or Fenn or both had beat Taylor out of $2,000.00 and they were going to see that Taylor got his money back (Ex. 31-72, 11-2797-2798). The record indicates that was the work of railroad representatives (11-2933-34-2798).

In the 1946 hearing when Randolph was requested by letter from Mr. Hulse to appear before the Advisory Committee, he was not told, either in the letter or at the hearing, that he was being investigated, but that the Committee was concerned with outstate lawyers obtaining cases in Missouri and suing in other states (9-2437 *et seq.* Ex. 31-38). It has been claimed in this proceeding that hearing constituted a warning to him but the record shows the Committee was very careful to conceal from him the fact he was the one being investigated (Ex. 31-38).

In the case of *In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825, 67 A.L.R. 2d 827, the Court said (l.c. 841):

> "There is substantial evidence in the record, undenied by investigator Ericksen, that he resorted to ruse and artifice in approaching former clients of respondent. There is direct evidence that Ericksen attempted to entrap respondent by representing himself as a relative of a person killed in an accident. There is ample uncontradicted evidence in the record to convince this court that Ericksen, acting with credentials of the Chicago Bar Association, was more interested in disbarring respondent than in determining the facts. Ericksen also introduced himself to other clients of respondent as from the United States Claims Department, and from the Attorney General's office."

There can be no question that the language above has application to the activities of the railroads and their claim agents, also the New Mexico Bar Associations. Also that counsel for the Court's Advisory Committee resorted to "ruse and artifice" to deceive them into the belief this was not a railroad investigation and to prejudice Randolph's former clients against him by creating in them a false belief Randolph had defrauded them in the settlement in spite of the conceded facts the clients got every cent they had coming to them (Informant's Brief, Supreme Court of Missouri, p. 7).

Right to Defend Himself.

The opinion of the Missouri Supreme Court severely condemns Randolph for the defense he made to the charges against him and the opinion makes it apparent that the severe punishment assessed was largely for making such defense (Opinion pp. 27-33). This was because of his letter to a former client (Ex. 31-56). It stands admitted in the record that the charges against Randolph came from the Railroads, particularly the Santa Fe Railroad (Comm. Rep. 13, Opinion pp. 32-33, 8-1896, 10-2620, 2622, 11-2725,

2933-34, 2890, 2919-20). Railroad claim agents were active throughout in the investigation of Randolph and assisted the Bar Committee in locating, contacting and making available as witnesses former clients of Randolph (Opinion 32, 11-2725, 10-2621, 11-2884, 2886, 2798, 2890, 2888, 2922, 2923, Comm. Rep. 12, 13).

None of Randolph's clients was making any complaint but all were perfectly satisfied (8-2219, 10-2620, 2675, 11-2827). There is no evidence to the contrary.

Randolph's clients would be suspicious of a railroad investigation and unlikely to be cooperative and they had to be aroused in some way to believe they had not been treated fairly by Randolph (10-2627, 11-2925-26). To overcome this the standard procedure of the prosecution investigators in every case unquestionably was to tell the former client that this was not a railroad investigation, that the committee and its attorneys had no connection with any railroad (10-2627, 11-2928-29, 2935; also a like finding by the Commissioner Comm. Rep. 13), and show them the checks and papers in their cases and tell them they had not been paid in their settlements the amounts to which they were entitled (11-2806, 2925-26, 2797, 2798, 2935, 2804, Comm. Rep. 13, 10-2627). In that manner they succeeded in leading four of the seventeen whose testimony is in the record of Randolph's clients (Hice 1-51, Tuggle 4-873-4, 925-26, 9-2354, Deason 9-162 and Carignan 10-2627) to believe either that Randolph had beat them out of some money in their settlements or that they could get more money by threatening to testify for the Bar Committee. Counsel for the Bar Committee did not try to disillusion them (11-2925-26). It later was admitted the clients got all they were entitled to under any view of their employment contracts (Opp. Br. 7, before Commissioner,

Comm. Rep. 202, 203), and no finding of shortage is found in the opinion of Missouri Supreme Court.

Randolph was informed by former clients and others of the activities of the Advisory Committee, its counsel, the Santa Fe Railroad and its attorneys and claim agents and the New Mexico Bar Association and the influence they were having on some of his former clients and felt he must take action in his defense (Comm. Rep. 31; 10-2620-21, 2627; 11-2775 *et seq.*).

The representations he made in the letters to a client in defense against the tactics of the railroad, bar investigators, and others were truthful, made in good faith and were justified.

Randolph said he felt compelled to take action in his defense, and wrote the letters complained of and made the statements complained of as a defense against the tactics of his opponents. He had previously attempted to file a petition in the Missouri Supreme Court asking protection of the Court from these activities of its Advisory Committee and Counsel, which the Court refused to let Randolph file (Ex. 31-67, 11-2755-2758). He was left no other means of defense against such vicious attacks. Mr. Thompson, Chief Counsel for the Bar Committee, stated he was certain Randolph was in good faith in stating that he had information that there might have been representations by the Association of American Railroads and from Santa Fe Attorneys that they were representing the Missouri Bar as they had made such proposals to him (11-2933, 2934).

During the hearing the Commissioner stopped Randolph from putting on further testimony as to the information on which he relied in making the challenged representations in said letters. The Commissioner said 11-2804:

"I would not think it would be necessary to detail any further basis. I am convinced that you believed you had a basis for making the representations."

Thompson went to Clovis, New Mexico, and contacted the Curry County Bar Association to find out whether investigator Fenn was a runner (11-2891, 2889, 2892, 2897-98, 2905, 2910, 2930-31). At the direction or request of the Attorney General of New Mexico, Charles Feezer, assistant District Attorney in a New Mexico Judicial District interviewed some of Randolph's former clients in that state (1737, *et seq.*, 11-2931). An assistant Attorney General of New Mexico took the deposition of Bouse which was used in this case (11-2980).

In February, 1954, Mr. Thompson was in Clovis, New Mexico, and conferred with the Bar Association (11-2902, 2888). Following that on April 24, 1954, a New Mexico proceeding was brought against Randolph, Fenn and the Santa Fe to prohibit Randolph from being employed by citizens of New Mexico in railroad cases (11-2951, 2911-12, Ex. 6-20, Comm. Rep. 77). Fenn wrote Randolph a New Mexico Attorney wanted to fly Bouse to Kansas City to testify Randolph solicited his case (Ex. 31-71, 11-2795). The Attorney General of New Mexico consulted with Mr. Thompson in Maryville, Missouri, concerning the matter on July 21, 1954 (11-2912), and Mr. Thompson later went to New Mexico to be present when depositions were scheduled in New Mexico in the case pending there. The depositions were continued and when they were later taken Thompson obtained copies (11-2916-18). This and other matters sworn to in said petition (Ex. 31-67) were the basis of Randolph's charge that there was a "conspiracy" between the Railroads, the Court's Committee and New Mexico Bar to deprive him of his license.

In finding Randolph guilty and giving him the heaviest punishment within the power of the Court under the above insufficient facts, and in refusing to hear and grant him relief under his said petition, the entire proceeding was lacking in fundamental fairness, and the Missouri Supreme Court deprived him of his Constitutional right to due process and equal protection of the law in protecting and defending himself against the charges made against him, guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

In re Sawyer, 360 U.S. 622, 79 S. Ct. 1376.

The finding that Randolph's attempts to defend himself by contacting his former clients reflected guilt (Opinion 27, Comm. Rep. 198-99) is a *non sequitur* and is not supported by any substantial evidence, but is contrary to the evidence.

In the case of *In re Heirich*, 10 Ill. 2d. 357, 140 N.E.2d 825, 67 A.L.R. 2d 827, where the Illinois Supreme Court absolved the lawyer from a similar charge, the Court said (l.c. 837):

> "Respondent was well aware that there were perhaps a few disappointed and disgruntled clients, who, under the influence of Ericksen, might be persuaded to deviate from the truth. To cope with such a possibility he employed these lawyers to accompany him and interrogate such persons in his presence."

Here the cases had been handled many years before. Clients' recollections would naturally be hazy and they would be more subject to failure of memory and more susceptible to suggestion than had the transactions occurred more recently. As a practical person Randolph must necessarily anticipate some of his former clients might therefore have forgotten many details or become disgruntled

under the influence of railroad claim agents, New Mexico lawyers and the attorneys for the Court's Committee tending to confuse and deceive them as to the facts. What he said about how their cases were handled was proved fully by the evidence.

The necessity for such counter measures became apparent when a few former clients like Hice, Carignan and Tuggle, after being interviewed by claim agents and attorneys for the Committee began claiming they had been beat out of money in their settlements. That Counsel for the Court's Committee had no basis in good faith to tell Randolph's clients he had beat them out of money in their settlements conclusively appears from the allegations of the Information filed by them, in which they charge that Petitioner's settlement check to the client was "*always in an amount equal to the client's net share of the settlement as defined in the initial contingent employment contract*", plus the amount the client was to pay his investigator, and that the client in every instance received a cashier's check "payable to the client *for his share of the settlement*" (Emphasis supplied) (Count I, Par. 1 (d) and Par. 2 (b)).

(f) FEDERAL QUESTIONS RAISED BELOW BEFORE THE SPECIAL COMMISSIONER AND BEFORE THE SUPREME COURT OF MISSOURI, EN BANC.

(1) Before the Special Commissioner.

In a typewritten brief filed before the Special Commissioner, at pages 10 to 12, Petitioner asserted his right to confrontation and cross-examination of witnesses (the action being more in the nature of a criminal than a civil proceeding. *Konigsberg* v. *State Bar of California*, 353 U.S.

252, 257-258, 77 S. Ct. 722, 725), and due process of law in defense of his property right in his license to practice law under the Sixth and Fourteenth Amendments to the Constitution of the United States. The exact text is set forth in the Appendix hereto in Exhibit F at pages A74 to A76.

The Special Commissioner specifically ruled the issue of due process and confrontation against Petitioner (Comm. Rep. 204-205). The exact text is set forth in the Appendix hereto in Exhibit F at pages A76 to A77.

(2) Before the Missouri Supreme Court, en Banc.

In Petitioner's printed brief filed before the Missouri Supreme Court, *en Banc*, as Respondent (the same being in the nature of exceptions to the Commissioner's Report Opinion 2), Petitioner charged denial of due process and equal protection of the law at pages 68 and 69 of said brief and again at pages 96, 104, 105, 141, 142, 143 of said brief, and of the right of confrontation and cross-examination at page 96). The exact text is set forth in the Appendix hereto in Exhibit F at pages A79 to A81.

The Missouri Supreme Court did not specifically rule the Constitutional questions raised by Petitioner but rendered an opinion and entered a judgment necessarily overruling all Petitioner's Constitutional points.

Thereafter Petitioner filed a timely Motion for Judgment of Acquittal or for a Rehearing in the Supreme Court of Missouri, *en Banc*, claiming denial of due process and equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; denial of free speech (including right of association), in violation of the First and Fourteenth Amendments to the Constitution of the United States; deprivation of the right of confrontation and cross-examination of witnesses, in

violation of the Sixth Amendment to the Constitution of the United States; the failure of the Court to observe the separation of governmental powers, in violation of Art. II, Sec. 1, Mo. Const. 1945, as well as denying him fundamental fairness in the proceedings guaranteed him under the Fourteenth Amendment. The exact text is set forth in the Appendix hereto in Exhibit F at pages A82 to A85.

The Supreme Court of Missouri denied Petitioner's motion for Judgment or for a Rehearing thereby overruling and denying Petitioner's rights under the aforesaid provisions of the Constitution of the United States.

In the case of *International Harvester Company* v. *State of Missouri,* 234 U.S. 199, 34 S. Ct. 859, 58 L. Ed. 1278, it was held federal questions first raised by exceptions to the report of a Special Commissioner in a Quo Warranto proceeding were timely. To like effect see: *Williams* v. *State of Georgia,* 349 U.S. 375, 75 S. Ct. 214, 99 L. Ed. 1161.

In *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 77 S. Ct. 722, in a case seeking to review an order of the State Bar refusing to certify an applicant for admission it was contended that Petitioner had not presented his Constitutional claims to the California Supreme Court in the manner prescribed by the rules. This Court overruled such contention and took jurisdiction noting that the Supreme Court of California often passed on issues ineptly argued or sometimes not raised at all.

The practice of the Missouri Supreme Court appears to be in accord with that of the California Supreme Court in that respect. *Sta-Whip Sales Company* v. *City of St. Louis,* Mo. Sup., 307 S.W.2d 495 (2); *Harris* v. *Bates,* 364 Mo. 1023, 270 S.W.2d 783; *State* v. *Spears,* 358 Mo. 23, 213 S.W.2d 210, 212; *State* v. *Burns,* Mo. Sup., 322 S.W.2d 738, 741.

Whether a Federal Constitutional question is properly raised below is itself a Federal question. *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania*, 296 U.S. 113, 58 S. Ct. 31, 80 L. Ed. 91; *Staub* v. *City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302.

Courts indulge every reasonable presumption against waiver of a fundamental Constitutional right and do not presume acquiescence in the loss of such fundamental rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461; *Taylor* v. *United States*, D. C., Ct. App., 238 F.2d 259, 261; *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 777, 90 L. Ed. 939.

III. Summaries of the Testimony of the Witnesses, Carignan, Tuggle, Deason, Bouse, Pauline Brown and Spriggs Selected by the Commissioner and Missouri Supreme Court As Their Strongest Cases Which We Believe Shows It Was Impossible for a Fair-Minded Court to Come to the Result Which Was Reached.

CARIGNAN CASE.

Carigan's testimony was read from the transcript of testimony taken before Advisory Committee (4-723, 4-724-25, 622, 600).

Carignan was injured June 27, 1946 (4-724). He and Tuggle had worked together and been close friends for more than 15 years (4-757-58, 697). Tuggle was injured sometime after Carignan and came over to Carignan's house quite a bit and told him he (Tuggle) had contacted a fellow named Smith and through Smith had hired a lawyer named Randolph (4-725-26). Tuggle suggested that Carignan hire Randolph so they could be together in their cases (4-726, 762, 693, 771). Tuggle recommended Randolph to Carignan and also recommended that he see Smith (4-697, 693, 747). Carignan stated he had no recollection of

having asked Tuggle to send Smith to see him but he "wouldn't go on oath one way or the other." (4-764, 726).

Smith testified that Carignan either called him down to Carignan's house or that Carignan came to his store (4-695), Smith did not call on Carignan while the latter was in the hospital. Carignan testified that Smith came to Carignan's house (4-764, 726). Smith also recommended Randolph to Carignan (4-762, 623, 765, 766; Ex. 25-12a-2311). It was about a year and a half after his accident when Carignan talked to Smith (4-725).

Carignan said Smith told him he would have to write Randolph for an appointment, but his letter does not bear this out (4-727, 561). Carignan wrote he would be in Kansas City August 26th and would like to see him (Ex. 25-12; 4-767, 768). Smith told Carignan he was going to be coming to Kansas City in his pick-up truck and Carignan could ride with him (4-727, 728). Smith made frequent trips to Kansas City to get appliances for his Boonville store (4-696, 727, 728, 772). Carignan accepted the offered ride and Smith let him out in front of Randolph's office building (4-728, 696). Randolph told Carignan he would take Carignan's case as the latter recalled it for a contingent fee of 40% if Randolph investigated the case but only 30% if Carignan hired his own investigator (4-769, 770, 771). Randolph did not mention Smith to him (4-730, 2312, 2329, 4-769-71). Carignan did not hire Randolph the first trip but went home and talked it over with his wife but did not discuss it with either Tuggle or Smith (4-771, 728). A few days later Carignan returned to Kansas City and hired Randolph (4-771, 772, 9-2307).

Carignan was in the hospital and did not know who investigated or what investigation was made in his case (4-773-775, 778). He knew his case had to be investigated (4-774-75).

At the time he employed Randolph the discussion was that if Randolph investigated the fee would be 40%, if Carignan investigated it would be 30% (4-770-71, 773). It was handled and settled on the basis Carignan would investigate and Randolph's fee was 30% (4-770-71, 562, 772, 796, 9-2310).

Carignan had been injured at Ft. Scott, Kansas, because of a bad hand brake (4-725). He knew little about the cause and it was necessary to find witnesses a year and a half after the accident requiring a lot of running up and down the line (4-564, 725, 690, 569, 565, 703, 688, 691). This investigation was made by Smith (4-696, 688 to 703).

Carignan testified that he did not hire Smith and did not know he had paid Smith until Mr. Thompson showed him the check to Smith (4-737, 738, 804, 733, 759). Carignan later testified he had a full discussion about it over a year before with Randolph and Randolph might even have shown him a copy of the check (4-807, 808).

Carignan admitted he signed the requisition for the cashier's check to Smith (4-795, 796, 785, 786, 787). He admitted he got his 70% of the net proceeds of the settlement and had no complaint against anybody (4-774, 769, 562, 796, 9-2310).

Carignan in later years, as secretary of the Brotherhood of Railway Trainmen made early contact with injured members, recommended legal aid of the Brotherhood and reported the accidents through Brotherhood channels to the Regional Counsel of the Brotherhood, who for several years had been a Missouri lawyer (4-741, 742, 815, 816, 813, 713).

When Randolph told Carignan in June, 1954, that the Advisory Committee for the Missouri Supreme Court was

investigating his handling of a number of F.E.L.A. cases, including Carignan's the latter became frightened and stated that he was sure it was not Petitioner, but Carignan and his setup with the Railroad Brotherhood and its regional counsel in Missouri that was really being investigated (9-2319), stating that his position as the secretary of the local lodge was only a blind to cover up his real activities of soliciting the cases of the injured railroad men for the Missouri regional counsel who paid him a commission on the cases where such counsel was employed (9-2319 to 21; 4-740-42, 815, 816). He later admitted as much to Smith (4-699). During this period Carignan admitted in his conversation with Petitioner (9-2322) and with Smith (4-698) that he had engaged and paid Smith to investigate his case for the 10% by which Petitioner had offered to reduce his fee if relieved of the burden and expense of making the full investigation.

But in early March, 1955, after Mr. Thompson interviewed Tuggle, the latter began to make trip after trip to Boonville to confer with Carignan concerning plans to recover from Randolph and Smith, the amounts they had paid Smith to investigate their cases. Carignan testified he didn't know how many times Tuggle came to talk to him about this matter, but tnat it was "numerous times" (4-753-54). Mr. Thompson then conferred with the Missouri lawyer at St. Louis who was a Brotherhood regional counsel for Missouri (11-2748), and Carignan made a trip "to St. Louis to see" the regional counsel who told him "to tell the truth about the matter" (11-2745). Carignan then told Smith the Brotherhood was back of him in his efforts to put Randolph out of the practice (4-713). Carignan although having had no previous contact with Mr. Thompson (4-745-746), then called him long distance at Maryville to "find out what was expected" of him (4-750), told him he was ready to talk to him and made

an appointment to meet him at the Boonville airport for that purpose (4-749). Later he and Tuggle by prearrangement met Mr. Thompson at the Boonville airport to be subpoenaed by him to appear at Kansas City, Missouri, on March 26, 1955, to give their testimony, *ex parte*, before a secret session of the Advisory Committee of the Missouri Supreme Court (4-941 to 43).

Carignan testified that his case was not solicited (4-752); that Randolph had been ethical in handling his case and had not asked him to lie, and that a case couldn't come to a lawyer any cleaner than his case came to Randolph (4-820-22, 823).

Randolph (9-2329) and Smith (4-660) both testified Carignan's case was not solicited.

TUGGLE CASE.

The Tuggle case is one of the cases relied upon by the Missouri Supreme Court as proving solicitation and supporting its judgment of disbarment (Op. 12, 16-18). Tuggle was injured in June, 1946 (Vol. 4-p 826). One Smith an ex-railroad man lived in the same town with Tuggle and was a friend of Tuggle's (4-608, 609, 827, 840, 891). Randolph had represented Smith in a damage suit 16 years before in a railroad accident case (4-601). About August, 1947, Smith recommended Tuggle to Randolph (4-1103). Smith denied he sought out Tuggle to recommend Randolph but testified he met Tuggle on the street and Tuggle asked him to recommend a lawyer and he recommended Randolph (4-609, 610). Tuggle did not take Smith's word but made an independent investigation of Randolph (4-893-94). He said Smith told him he would have to write Randolph for an appointment (4-828-829). But his letter shows he wrote Randolph asking him to come to Boonville to go over Tuggle's case (Ex. 26-15). Randolph replied by letter sug-

gesting Tuggle come to Randolph's office to expedite the matter (Ex. 26-15 and 19). Tuggle went to Randolph's office August 19, 1947, and employed him (Comm. Rep. 6). Smith denied taking Tuggle to Kansas City to see Randolph (4-610, 682). As did Randolph (9-2355). Tuggle admitted Randolph told him the fee would be 50% if Randolph investigated the case but that if Tuggle would take care of the investigation it would be something like 15% less (4-884-85, 939).

The claim that Randolph recommended that Tuggle employ Smith to investigate his case is based on Tuggle's testimony that Randolph said "Smith could be of help to me along with the other men" (4-940) and "He (Randolph) wanted every man down there to help us" (4-941): "Mr. Randolph said that Mr. Smith could be of help to me along with the other men." (4-940).

Smith received 12½% of the 62½% paid Tuggle in the settlement (4-685-687, 680). Smith testified he was employed by Tuggle to investigate the case (4-609-11, 695-96). He was very active in the investigation of the case (4-663-675, 1101). Tuggle admitted Randolph showed him statements of several witnesses (4-947-48). Tuggle himself took no statements and Randolph took none so Smith must have taken them (4-947, 948, 949, 1118).

Except in his former official capacity with the railroad (4-647-8), Smith testified the only cases he ever investigated were the Tuggle and Carignan cases (4-608). He worked on the Tuggle case for about six months (4-620). He got a list of a dozen or more witnesses in the case (Ex. 26-7, 5-1101).

On June 8, 1948, the Tuggle case was settled for $15.-000.00 to the complete satisfaction of Tuggle (4-888, 880, 882, Comm. Rep. 6). Tuggle admitted that when he settled

with Randolph they discussed paying Smith and admitted he signed the requisition to the bank for the Smith draft (4-906). He admitted he knew he got 62½% instead of the 50% he would have received if Randolph investigated the case (4-875, 906). He first testified untruthfully that he never saw the draft in payment of Smith's services until Mr. Thompson showed it to him shortly before he testified, *ex parte* (4-834-35, 875). He later was forced to admit he knew about it and discussed it a year and a half before with Randolph and may have even seen it at that time (4-914, 915, 916). He had no suspicions and made no claims against Randolph or Smith until after Mr. Thompson interviewed him and showed him the checks at which time he became convinced he had been "beat" out of some money due in the settlement (4-915, 916, 917, 918, 919, 884, 873, 907-909, 925-26).

Tuggle testified that when Mr. Thompson, after a long search (4-922), found him in his hideout in Kansas where he had fled from threatened prosecution for many forgeries in Missouri (4-834, 848, 9-2348) showed Tuggle a photostat of the check to Smith and "just told you that was your money? A. That is right * * *" (4-908). That was when "you began to get the idea that Smith had gotten some money that he wasn't entitled to, didn't you? A. Yes" (4-925-26). He admitted he told witness Wade with a bank he owed money that Smith was not entitled to the $1,800 and "I was going to get it back, or try it" (4-872). As to Petitioner owing him $1,800.00, he said, "Yes, I would say him and Smith did owe me $1,800.00" (4-874, 875). He admitted discussing with Mr. Thompson the testimony he was to give against Petitioner and the help in return he was to get in collecting $1,800 from him, saying "* * * he told me he would advise me about getting the money after this investigation was all over * * * I can't inform you until

after it is all over, and then * * * I will send you to a lawyer" (4-873). "Q. * * * to get your money? A. Yes * * *" (4-873).

He also admitted he told Mr. Wade that very shortly he expected to get $2,500 in connection with his testimony in the investigation (4-870), but said, "I told him the investigation would all have to be done * * *" (4-872). Mr. Wade testified Tuggle told him "definitely he was getting some money * * * he was going to get somewhere in the neighborhood of $2,500. He said the Supreme Court of Missouri was investigating the matter * * * Q. Did he indicate he was going to get the money after he testified in that matter? A. That was the general idea, yes" (9-2369, 2370).

Tuggle further admitted discussing the same matter with witness Gaskill, the president of the bank (4-874), who also testified that Tuggle told him he expected to get $1,800 plus interest based on an old settlement with a railroad where "the attorney * * * hadn't turned in all the money that was due him", identifying the attorney as "a Mr. Randolph", and further said Tuggle "mentioned if I were questioning his likelihood of getting this that he thought Mr. Thompson of Maryville, an attorney up there could tell me more * * *" (9-2363).

Tuggle testified that after his interview with Mr. Thompson he made various trips to Boonville, Mo., and conferred with Mr. Carignan, a close friend, who also testified for the Advisory Committee, and discussed with him ways and means to collect from Petitioner and Smith the respective investigation fees they had paid to Smith many years previously (4-926), talking to Smith about it (4-928), and later telling Petitioner in his office that he and Carignan were intent upon recovering the money from Smith, saying "Tell Smith to get his hand on his pocketbook" (4-929-30).

Smith testified that Tuggle and Carignan called him from the latter's place of business in Boonville and cursed him over the phone, accused him and Petitioner of beating them out of a lot of money, and threatening bodily harm, saying, "You and Randolph does the paying * * * Carignan and I are going to beat hell out of you and Randolph both"; that Tuggle also said, " 'I am down here now to tell them (the Advisory Committee) what they want', and he says. 'I am going to tell them plenty' * * *" (4-678-80).

It is apparent from the above testimony that Tuggle was motivated by a desire to get back the $1,800.00 paid Smith and was playing for help from the lawyers of the Bar Committee to accomplish that purpose.

At one place in his testimony Tuggle admitted he lied and that he did that "pretty often." (4-937).

The evidence showed Tuggle had forged the names of a number of persons on notes which had been negotiated with a finance company as being genuine (4-135, 136, 9-2392, 2397-98, 2405-06, 2415).

Tuggle testified Smith did not solicit his case (4-892, 894 895) and that Randolph did not do so (4-892-894, 895).

DEASON CASE.

As Deason was the only former client of Randolph's who appeared in person before the Commissioner and testified against him, and as this case is one of those emphasized by the Supreme Court of Missouri as establishing the charges against Randolph (Opinion, 12, 21-24, 26), we shall discuss that case somewhat more fully than it is possible to do in the other cases specially mentioned.

The charge in this case is that Brown was paid for soliciting Deason's case for Randolph There is no sub-

stantial evidence to sustain the judgment of the Court as to such charge, as we shall now demonstrate.

Deason's accident occurred on February 9, 1946 (1-107, 119). Within a few days Deason's sons, Bruce and Charles, picked up from the crew Deason worked with carbon copies of the statements the crew members had given to the Claim Agent (1-172-73, 113, 114, 127). Charley Bowers, a friend of Deason's, came by to see how he was and Deason asked him to find out who a man he had worked with named Chick White had as his lawyer (1-122, 110, 123). It took Bowers three or four days to find out and report to Deason that Randolph had been White's lawyer (1-122, 123). Deason then had his wife get Randolph on the telephone and Deason talked to Randolph about handling his case (1-122, 110, 123). Two or three days after Deason had called and talked to Randolph, a man representing himself to be named Brown came to see him (1-111, 121). This man told Deason he was working for some Minneapolis lawyers but Deason "told him right off", that he didn't want a bunch of lawyers—that he had already called a man he imagined he would use, and told him that man was Mr. Randolph (1-111, 121). This man then recommended Randolph (1-121-124). This was after Deason had contacted Randolph on his own (1-121-124). Deason saw this man only once and did not "know whether he was O. C. Brown or not" but "imagined he was". (1-111, 112); "I suppose it was the same man." (1-109). He thought O. J. Cason or Mrs. Cason sent Brown to see him (1-111, 124). Deason's son Bruce, who took him to Randolph's office in the first instance (1-183), went with him on every trip to the scene of the accident (1-175, *et seq.*) and was with him at the time his case was settled, testified he knew nothing about the supposed visit of Brown (1-183); that Brown had not solicited his father's case for Randolph to his knowledge (1-183).

Deason went to Randolph's office and employed him on February 19, 1946 (1-119, 125, 120, 110, 113, 11-2374). Randolph had not contacted him previously (1-120). The contract provided that if Randolph investigated the case the fee would be 40% but if Deason got his own investigator Randolph's fee would be 26-2/3% (9-2270, 2272). Deason testified he was not influenced by Brown to employ Randolph (1-123, 124, 183, 121). Deason testified "I don't figure that Brown had anything to do with Randolph getting this case." (1-123, 124). Deason further testified the reason he got Randolph was because he had handled White's case and got a pretty good settlement and he figured Randolph was a good lawyer (1-124, 123). He testified that was the only reason he hired Randolph (1-124). He further testified Brown didn't mean anything to him and he did not pay any attention to Brown (1-134, 121).

Deason admitted he endorsed the settlement check from the railroad (1-132, 135, 137); that an attorney's fee of $5,066.67 or 4/15ths was probably right (1-135, 136); that he must have endorsed a check for $13,782.53 (1-137, 138, 140); that he might have signed a pink requisition slip to get the cashier's check for himself and it could have called for two checks (1-144, 143, 145, 146); that Brown's name could have been on the requisition he signed (1-145, 146); that Brown could have done some investigating in his case but he didn't know anything about it (1-129, 130, 131, 132); that the first time he was at the scene he was there with Bruce and a photographer (1-130-131); he did not know the name of the photographer (and his son Bruce denied knowing the name of the photographer with him and his father) (1-174). Bruce said Randolph got the photographer (1-174). There was no charge for the photographer on Randolph's settlement

sheet (Exs. 23-2, 9-2289-90) so Randolph did not furnish a photographer. The evidence clearly shows the photographer who took those pictures was Brown but Deason could not admit that without destroying all usefulness of his testimony for the prosecution (1-130, 132, 136, 174).

Brown went to the scene and made measurements and took some 23 snapshot pictures referred to in the various exhibits (2-528, 527, 530-533, 535, 11-2738; Exs. 23-25, 4 and 9, 2-540). Brown investigated the scene and uncovered the end of a rail sticking up in the loose gravel which was in position to cause Deason to stumble (2-533, 535-36). Brown then made a picture of this rail and had it blown up for Randolph (2-533-539), which was used and referred to by the Terminal attorney when he took Deason's deposition (3-542).

During the investigation in April, 1955, some 2½ years before he testified before the Commissioner, Deason made an affidavit for Randolph in which he stated he had employed Brown as his investigator (1-115; 1-148; Exs. 23-6, 116, 130, 157, 156, 182-83). Deason told Randolph the affidavit was true about a month before he first complained he had been beat out of $2,500 (9-2285, 2275, 2301-02).

He later denied the truthfulness of the affidavit saying he swore to an untruth to help Randolph (1-156, 157, 115, 116). He stated when he learned he would have to testify he wanted to change the statement (1-157, 158, 159), as he claimed he thought when he swore to it that it would only be used to convince the Bar Committee and he would not have to go to Court (1-1-156, 157, 158). He testified he did not hire Brown to investigate his case (1-109) which is wholly contrary to the facts set forth in his affidavit (Ex. 23-6, 1-150, *et seq.*).

Deason testified the part of the statement was true where it read (1-155-56):

> "I am well pleased the way it came out as I am sure I couldn't ever have gotten much out of the company without their services * * *."

"Their" necessarily referred to Randolph and Brown.

He also testified (1-165):

> "I tell you I had given him that statement in good faith."

Deason testified the first time he learned Brown got any money out of his case was when Randolph came to see him (1-109, 110, 142, 146; R. 9-2301). He raised no objection and made no protest at that time (9-2301-02, Ex. 23-6).

Counsel for the Court's Committee succeeded in convincing Deason he had been beat out of $2,500.00 in his settlement (1-162, 163, 186, 187, 189). Mr. Thompson and Mr. Ross showed him the $13,732.53 check with which he had bought bank checks to himself and Brown and told him that appeared to be the amount he should have received for himself (1-162, 161, 163, 164, 186, 187, 188, 189). They also told him "that apparently the way the thing looked that I had been beat out of $2,500.00" (1-162).

Deason then demanded that Randolph pay him $2,500.00 and tried to blackmail Randolph into paying him that sum to testify for Randolph and to keep him from testifying for the Bar Committee (1-162, 164, 165, 168, 170, Ex. 23-12, 169, 185, 9-2277, 2274, 2276, 2278-83). Deason said he would rather deal with Randolph than with the Bar Committee (1-169, 170, 168, 9-2281), but that he had the telephone number of the Bar Committee lawyers and could call them if he decided to help them (4-2277, 2281). Dea-

son called Randolph several times over the next few weeks, even offering to reduce his demands (1-2281, 84, 1-167-170). Randolph refused to be blackmailed (1-170, 9-2281, *et seq.*) and the only reasonable inference is that Deason called the Bar Committee lawyers and appeared voluntarily to be a witness for them (1-168-69, 185). Deason's son Bruce testified he and his father had discussed the matter after Thompson and Ross saw his father and the latter "told me that he thought he had" been beat out of money (1-186), and he guessed they would have to sue Randolph (1-189, 187-88).

In attempting to explain his claimed failure to see the settlement check Deason said Randolph no doubt had him endorse the check seven months previously when he hired Randolph; he rather thought Randolph had a blank check with his indorsement from the day he hired him (1-138, 140). This was disproved by the fact Randolph had printed checks consecutively numbered which were all accounted for, demonstrating the falsity of such claim (9-2286-88, Ex. 23-3).

As an excuse for his claimed lack of attention to the settlement papers, Deason testified he was in a hurry to get to the Columbia Bank to cash his check before the bank closed and so left in a hurry and was just able to get his check cashed at the Columbia Bank before it closed that day (1-141, 143, 177). But the cashier's check to Deason dated September 25th for his net 60% was not cashed at the Columbia Bank on September 25th as testified by both Deason and his son, but two days later on September 27th, as shown by the check (Ex. 23-4, 23-131; 9-2288-89). The 26th fell on a Thursday and was a regular banking day so if the check had been cashed late on the 25th it would not have been dated later than the next day (9-2288-89). So if they hurried to a bank to get a check

cashed it had to be the Commerce Trust Company to get Randolph's settlement check cashed.

Deason testified his case was not solicited (1-110-111, 113, 121).

BOUSE CASE.

The Bouse case involved two injuries, one in January, 1946, and one on May 1, 1947 (Ex. 6-18, 8-2053, 10-2692). L. A. Stevenson, a former client of Randolph's, recommended Randolph (11-2982). A man named Bryant also recommended Randolph (11-3005). He telephoned Randolph for an appointment and went on the train to Kansas City to see Randolph (11-2982, 3005). Randolph would not take his case and Bouse made the third trip to see Randolph before he had sufficient information to induce Randolph to take his cases (11-3020). After the first trip to see Randolph, Bouse took some statements of witnesses (11-3006, 3007). He took those statements to Randolph but still had not obtained enough information to interest Randolph in taking his case (11-3007-08). After Bouse had been to see Randolph the second time he met Stevenson at the drug store and told Stevenson he was not doing any good in his cases (11-2984-85). Stevenson recommended Fenn as an investigator as Fenn had investigated Stevenson's case (11-2985). Bouse then discussed his situation with different fellows that had cases settled, including one Stevens and one Love, who recommended that he should get all the statements of witnesses he could get (11-2999, 3000). Although he and Fenn had been good friends since 1935 or '37, Fenn had not contacted Bouse (11-2982, 2991). After the second trip to see Randolph, Bouse sought out Fenn at Stevenson's suggestion, and after a discussion Fenn agreed to help him (11-3000, 3009, 3010). They were such good friends Bouse did not then

realize that Fenn would charge him for helping him (11-3010). Randolph had not suggested that he hire Fenn to investigate (11-3002, 3008). Bouse's contract with Randolph provided Randolph should receive 26-1/3% if Bouse stood the expense of investigation and 40% if Randolph made the investigation (8-2059, 11-3003, 3004, 3026, 3029). Bouse testified he hired Fenn—he didn't even know Randolph and Fenn were acquainted (11-3029, 3030, 3035, 3003). After Bouse's third trip to Kansas City when he employed Randolph he discussed with Fenn about pay for his services (11-3018, 3020). He testified: "I may have agreed to pay him a per cent, Mr. Spahn, if I did I don't remember what it was." (11-3019, 3025). Bouse told Fenn to send his statement for services to Randolph so his case could be all settled up at the same time (11-3011, 3016, 3023, 3025, 3030). It was Bouse's money that paid Fenn for his investigation (11-3012, 3013, 3015, 3019, 3026-27). Fenn took later statements of the witnesses than Bouse (11-2997, 3000, 3002). The case was under investigation over a period of twelve or thirteen months (1-263).

Bouse testified that neither Fenn nor Randolph solicited his case (11-3009; Ex. 6-20; 11-2938, 3014-3020).

HICE CASE.

Hice was the only former client of Randolph's who testified his case was solicited for Randolph (1-15).

Randolph testified he never employed or paid a runner to solicit cases for him (8-1902). Former clients who testified their cases were not solicited (Opinion 34) were:

> Deason, Vol. 1, 110-111, 113, 121; Carignan, Vol. IV, 725, 762; Tuggle, Vol. IV, 892, 894, 895; Bouse, Vol. XI, 3005-11; Dunham, Vol. VI, 1461; Brinker (for himself and Simmons, deceased), Vol. VII, 1799-1801; Beck, Vol. VI, 1404-7; Goodner, Vol. VII, 1662-1666; E.

E. Jennings, Vol. VII, 1589-1593; Thomas, Vol. VI, 1349, 1350, 1379; 1517-1523, 1525-1527; Mears, Vol. VI, 1522, 1525-1526, Ex. 16-25; Harris, Vol. V, 1227, 1228, 1234, 1235; Jarboe, Vol. IV, 988, 984-988, 989; Whinery, Vol. V, 1172-1177; Hunnicutt, Vol. VI, 1292.

Mears, a former client of Randolph's, testified he recommended Randolph to Hice (6-1549, 1500); that he told Hice Randolph charged 40% if he investigated but if Hice would get his own investigator he could get Randolph for two-thirds of 40% (6-1551); that he (Mears) had hired Fenn as his investigator (6-1551). Hice told Mears that he believed he would get a pass to Kansas City to talk to Randolph and later said he "caught a ride to Kansas City" and had hired Randolph and Fenn (6-1551, 52, Ex. 16-21).

Beck, a former client of Randolph's, testified that when he got hurt Hice recommended Randolph to him and told him he had hired Randolph as his attorney and later Fenn as his investigator to handle his case and got a good result on the basis of ⅔ of 40% to Randolph and ⅓ of 40% to Fenn (6-1431-1432).

Hice claimed Fenn brought him to Kansas City to see Randolph but was forced to admit that Stone, the griever for his union, also came along (1-32-33). Hice told Randolph he had been recommended by Mears and Randolph did not know Hice had come to Kansas City with Fenn and Stone on a trip to buy a car to avoid paying a lug demanded in New Mexico until after the charges were filed (8-1976).

He was interviewed by Barrick, the Bar Committee investigator, and at first denied he gave Barrick a statement but later admitted Barrick took a signed statement from him (1-49-51). He first denied he had talked to Hinkle, Santa Fe Claim Agent, since he settled his case

(1-46) but later admitted Hinkle only a few months previously had come to Texas, discussed his case with him and tried to get him to come to Kansas City to testify before the Court's Advisory Committee at the first hearing (1-46-48). He first denied discussing with Fenn his employment as investigator (8-1926) and later admitted it (1-34A, 35). He first denied knowledge anyone was investigating his case but later said he thought Fenn was investigating it (1-34A). He first denied (1-46) but then admitted he came from Texas to Kansas City to testify before the Committee at the request of Hinkle, Santa Fe Claim Agent (1-46, 47).

Hice was otherwise thoroughly impeached and discredited. Thus, he first admitted the indorsement on Randolph's check to him was his signature but when he saw that the check to him included his investigator's fee, which he had denied knowledge of, he denied his signature (Ex. 1-15; 1-40 to 46; 8-1996, 1997).

That Claim Agent Hinkle had preceded Barrick to Hice and poisoned his mind was manifest. It appeared from Hice's testimony, from his statement to Barrick and the latter's report, that Hice told Barrick he could have settled direct with Hinkle for as much as Randolph got in settlement ($15,500.00) and continue working for the Santa Fe, and that was what he intended doing (1-51). Also Barrick reported, "Hice was a willing witness because he felt Fenn and Randolph gave him a raw deal." (1-51). But on cross he was forced to admit that he had negotiated with Hinkle for months and all he would offer him was $5,000, and told him the Company wouldn't pay him any more, and that was when he hired Randolph (1-51). Hinkle's talent and proclivity for getting people to make false statements, even in affidavits, as to such matters appears from the affidavit of Fanny Ward attached as an exhibit to Randolph's

petition to the Missouri Supreme Court in May, 1954 (Ex. 31-67). This affidavit related to another affidavit that Hinkle required her husband, Danny L. Ward, to make in the hospital in her presence before Hinkle would settle his case. That affidavit was then turned over to the Court's Advisory Committee and by it made the basis of a charge in the first notice to Randolph for a formal hearing. Although this charge was included among the first ten charges which the Court's Committee voted "unanimously" to file an information on in Court, the Committee thereafter filed an amended notice of charges from which it, without explanation, omitted the Ward charge (Ex. 31-67).

THE PAULINE BROWN CASE.

Mrs. Brown's husband was killed on November 30, 1944, and on January 6, 1945, one month and six days later, she wrote a letter to Petitioner seeking to employ him (Ex. 27-4, 27-4a, 5-1098). Petitioner replied giving the terms on which he would accept employment and enclosed a contract on such terms for her to sign and return (Ex. 27-16).

Mrs. Brown was a cousin of Cliff C. Jennings who had a suit for personal injuries pending against the Santa Fe in which Petitioner was his attorney (9-2426). C. C. Jennings was then assisting in the investigation of the E. E. Jennings case and helping in the investigation of his own case. C. C. Jennings had recommended Randolph to her previous to her letter. Instead of signing and returning the contract as contemplated in Randolph's letter, she went to Kansas City to see Randolph, riding with her cousin, C. C. Jennings whose case was then being settled (9-2426, 27-5). Petitioner explained the advantages of getting her own investigator. She signed the same contract Randolph

previously sent her but notations were written on it making the fee depend on which party paid for the investigation (Ex. 27-17). She suggested as investigator her cousin "Cliff" (5-1140, 9-2425, 5-1098-99). She subsequently employed C. C. Jennings to investigate her case as the sole investigator (5-1129, 7-1630-31, Exhs. 27-17, 27-3).

Apparently that case is singled out for mention in the opinion (Opinion pp. 12, 27) as an introduction to the much criticized letter Petitioner wrote Mrs. Brown (Mayhon).

There is in this case no specific evidence pointed to or claimed to show solicitation but the case was apparently assumed by the Commissioner and the Court to come within the general contention that all Petitioner's cases must have been solicited (Opinion 11, 24).

Certainly there was nothing in the facts of that case tending in the slightest to show any misstatement in the criticized letter, or any misleading or overreaching of this client.

THE SPRIGGS CASE.

The Commissioner found (Comm. Rep. 153) and the Missouri Supreme Court found (not specifically but by general adoption of the Commissioner's Report) Fenn solicited this case for Petitioner under circumstances which warranted the inference this was the common practice (Opinion pp. 24, 36, 38, Adopting Commissioner's Report). A fair statement of the evidence shows the necessary inference is exactly to the contrary.

The only oral evidence before the Commissioner was given by Petitioner in person (5-1153; 11-2662-2769; 8-2008; 10-2507). His testimony in substance was briefly as follows: Upon his return from a trip out of town he found

in his accumulated mail in an unmarked envelope a purported contract signed by Mrs. Spriggs and her foster mother, Mrs. Morton, and a filled out information form formerly used by McDonald and DeParcq with DeParcq's name marked out. There was no accompanying letter (8-2008). Soon thereafter, he thinks later that same day he received a long distance call from Fenn explaining the two documents, exhibits 2-1a and 2-2a (8-2008-09). Fenn told him a retired railroad man, J. A. Valentine, came to him and told him the family of Johnny Spriggs, who had just been killed on the Santa Fe, had sent him to ask Fenn to come to their house to discuss the hiring of a lawyer. Fenn told Valentine he did not represent any lawyer and refused to go (8-2009-10). Valentine came back to see Fenn on the following day with a more urgent plea that he go to the Spriggs home to answer some questions and assist them (8-2011). Fenn then went with Valentine to the Spriggs home to answer such questions as he could (8-2010-2011). Mrs. Morton met them at the door and seemed to be expecting them. Mrs. Morton talked in the presence of Mrs. Spriggs saying that she knew the railroad company wouldn't do the right thing and would beat the widow out of everything she was entitled to, and that they wanted to get a lawyer right away who understood how to handle such cases. Fenn told her he did not represent any lawyer at all (8-2012). She inquired about his activities and he told her he had been an investigator for McDonald but McDonald had died and he had no connection with any lawyer (8-2012). That since that time his activity had been that he had investigated some cases for clients who had hired a Kansas City lawyer but he had no connection with such lawyer and could not speak for him (8-2013). Upon further questioning he told her that he had investigated one death case in which Petitioner was the lawyer where Petitioner had charged two-

ninths and he had charged the widow a fee of one-ninth making the total outlay in her case one-third. That Mrs. Morton said they would pay one-third and wanted to sign a contract and get a lawyer on the job right away before the claim agent got it fixed so they could not do anything. The only contracts Fenn ever had were McDonald's when he was McDonald's local investigator so that when a client hired McDonald over the phone McDonald would direct Fenn to get the client to sign a contract and fill out an information form and then investigate the case (8-2013, 11-2769-72, Exs. 2-6, 2-5). Mrs. Morton insisted that Fenn get one of such contracts and they would sign it and send it to Petitioner. Upon her insistence Fenn returned to his home, got the forms, which were signed by them and mailed to Petitioner (8-2014-2015). Randolph scolded Fenn for his assistance in this regard, reminding him of a previous admonition never to recommend him to a prospective client or even to solicit an investigation in any case he was handling (8-2015). He told Fenn that he thought Fenn had violated the spirit of this admonition, but under the facts he did not believe Fenn had solicited this case (8-2015-06).

Petitioner was in a quandary as to what was the proper course to pursue in this embarrassing situation. He had no notion of accepting the contract. In the meantime the claim agent called on Mrs. Spriggs and convinced her that he would treat her right if she could get a release from Petitioner. She wrote Petitioner for a release and Petitioner promptly replied in such wise as to satisfy her and the claim agent that they were at liberty to settle free of any obligation to him (8-2016, Ex. 2-4; 10-2567, Ex. 2-3a). The participation of Valentine, a retired railroad man with no indication or suggestion in the record he had ever been a runner or investigator in any case, is shown by the letter asking a release from Petitioner in which it referred to

"the agreement with you which was delivered to us by Mr. J. A. Valentine and Mr. Norman Fenn" (8-2016, Ex. 2-4).

The evidence positively disproves the Commissioner's expressed opinion that "what Fenn did in the Spriggs case is simply an exposure of his common practice" (Comm. Rep. 153). In no other case offered to or handled by Petitioner did Fenn ever assist the client in his execution of a contract of employment with Petitioner, and this was on a form never used by Petitioner in any of his cases. In all the other cases where there were written contracts they were on the Demaree form and were taken from the client at his office or by him sent by mail direct to the client (Exhs. 1-8; 3-13; 6-18; 7-14; 8-12; 9-23; 10-26; 11-22; 14-16; 15-22; 16-19; 17-16; 18-15; 19-14-27-17).

Randolph denied, and it is not claimed, he ever represented Mrs. Spriggs (8-2017), and he emphatically denied that he employed Fenn as a runner in the Spriggs case (8-2020).

(g) ARGUMENT FOR ALLOWANCE OF THE WRIT.

I.

Rule 5 of the Missouri Supreme Court Makes the Supreme Court Through Its Completely Dominated and Controlled Agencies the Investigator, Judge and Party, Arbiter and Advocate in the Same Disbarment Cause Thereby Depriving Petitioner of the Intrinsically Fair Trial Before an Impartial Tribunal Demanded by the Procedural Due Process Requirements of the Fourteenth Amendment to the Constitution of the United States. In Addition Thereto It Is Here Enforced in a Discriminatory Manner.

Under the heading "The Facts Material to the Questions Presented," *supra*, we have described the machinery

provided by Rule 5 of the Missouri Supreme Court and explained how it operates. It invests the Missouri Supreme Court with all the power and authority of investigator, judge and party, arbiter and prosecutor. This is in direct violation of the separation of governmental powers provisions of both the Missouri (Art. II, Sec. 1, Missouri Constitution, 1945) and United States Constitutions (Articles I, II and III, United States Constitution), and deprived Petitioner of due process of law in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In the case of *Crowell* v. *Benson*; 285 U.S. 22, 60, 52 S. Ct. 285, the Court said (l.c. 296):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of the fact and law, necessary to the performance of that supreme function."

The same rule applies in Certiorari against a state.

In the case of *Inland Steel Company* v. *National Labor Relations Board*, 7 Cir., 109 F.2d 9, the Court said (l.c. 20):

> "That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In Tumey v. Ohio, 273 U.S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A.L.R. 1243, the court said: '* * * No matter what the evidence was against him, he had the right to have an impartial judge. * * *'
>
> "The court, in Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038, said: 'Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * *'
>
> "The principle is aptly stated in People v. Naimark, 154 App. Div. 760, 139 N.Y.S. 418, 420, where it is said: '* * * The first idea in the administration of

justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.'

"And the fact that the court's judgment may be justified on the merits does not obviate the requirement of a fair trial. As was said in Union Pacific R. Co. v. Syas, 8 Cir., 246 Fed. 561, at page 563; '* * * But no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial. * * *' "

"Justice must satisfy the appearance of justice. Levine v. United States, 80 S. Ct. 1038, 1042."

In the case of *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50, 70 S. Ct. 445, the Court said (l.c. 454):

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."

See to like effect: *Kwong Hai Chew* v. *Colding,* 344 U.S. 590, 597-598, 73 S. Ct. 472, 478 and footnote 7.

In the case of *Joint Anti-Facist Refugee Committee* v. *McGrath,* 341 U.S. 123, 161, 164, 71 S. Ct. 624, the Court said (l.c. 643):

"Fairness of procedure is 'due process in the primary sense.' Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681, 50 S. Ct. 451, 454, 74 L. Ed. 1107. It is ingrained in our national traditions and is designed to maintain them. * * *"

(l.c. 644:)

"* * * Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that 'in the develop-

ment of our liberty insistence upon procedural regularity has been a large factor.' Burdeau v. McDowell, 256 U.S. 465, 477, 41 S. Ct. 574, 576, 65 L. Ed. 1048 (dissenting). It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense —a right to his day in court—are basic in our system of jurisprudence'. In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682. 'The hearing, moreover, must be a real one, not a sham or a pretense.' Palko v. State of Connecticut, 302 U.S. 319, 327, 58 S. Ct. 149, 153, 82 L. Ed. 288. * * *"

In the case of *Niemotko* v. *State of Maryland*, 340 U.S. 268, 271, 71 S. Ct. 325, the Court said (l.c. 327):

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded. See Feiner v. New York, 340 U.S. 315, 71 S. Ct. 303. A brief recital of the facts as they were adduced at this trial will suffice to show why these convictions cannot stand. At the time of the arrest of each of these appellants, there was no evidence of disorder, threats of violence or riot. There was no indication that the appellants conducted themselves in a manner which could be considered as detrimental to the public peace or order. On the contrary, there was positive testimony by the police that each of the appellants had conducted himself in a manner beyond reproach. It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there is no statute or ordinance prohibiting or regulating the use of the park without a permit."

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, in a Certiorari proceeding, the Court said (l.c. 270):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Speiser* v. *Randall*, 357 U.S. 513, 520-521, 78 S. Ct. 1332, the Court said (l.c. 1339):

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the fact-finder appraises the facts than on the disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. Powell v. State of Alabama, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. Dennis v. United States, supra; Whitney v. People of State of California, supra, the procedures by which the facts of the case are adjudicated are of special importance and the validity of

the restraint may turn on the safeguards which they afford. Compare Kunz v. People of State of New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280, with Feiner v. People of State of New York, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech."

In the case of *Carter* v. *People of State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, in a Certiorari proceeding, the Court said (l.c. 218):

"The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

In the case of *In re Murchison*, 349 U.S. 133, 136-137, 75 S. Ct. 623, the Court in a Certiorari proceeding arising out of a state court contempt judgment in reversing a judge who first sat as a one-man grand jury and then as trial judge, said (l.c. 625):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This

Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. * * *"

The Missouri Supreme Court in its opinion although forced to admit that a number of former clients testified they employed their own investigators and their cases were not solicited (Opinion 34) (Here please see summary of testimony of prosecution witnesses, Tuggles, Carignan, Deason and Hice, following statement of facts, *supra.*) and that witnesses testifying against Petitioner and in support of the charges "were to some extent impeached and contradicted" (Opinion 35), yet the Court deliberately and

in all cases accepted as true not only the testimony of such impeached witnesses, but also accepted the secret *ex parte* statements and testimony of witnesses when first approached, frequently not under oath about matters occurring many years before, and at a time when their recollections were not refreshed, and disbelieving all their later testimony under oath after their recollections had been refreshed, and they were subject to cross-examination. They endured the cross-examination of prosecution witnesses with "a deaf ear and a closed mind" (Opinion 33, 34; Comm. Rep. pp. 199, 204-06 adopted by Missouri Supreme Court, Opinion 24, 36).

The Missouri Supreme Court in its opinion condemned Petitioner for informing former clients that the attorneys and investigators for the Supreme Court Bar Committee and the railroad claim agents were falsely representing the investigation of Petitioner was not a railroad investigation and that he has overreached them in the settlements (Opinion 32, 33, 37, 38). It was admitted the charges against Petitioner came from the Santa Fe Railroad (Opinion 32; Comm. Rep. 13; 11-2890, 2933-34). It was also established in the record beyond question that the American Association of Railroads and its Claims Research Bureau, largely through the Santa Fe, were active throughout the proceedings behind the scenes in hunting up, contacting, taking statements and making available for the Supreme Court Bar Committee such former clients as they could influence to help the Supreme Court Committee (10-2620; 1-48; 11-2725, 2932-34, 2797, Ex. 31-72; Exhs. 10-30, 11-13).

Nationwide Plan of Association of American Railroads to Eliminate Specialists in F.E.L.A. Cases.

That the primary purpose of the railroads, particularly the Santa Fe, in pursuing their admitted reprehensible

activities in this matter was to eliminate from the practice a specialist in handling F.E.L.A. cases on behalf of their employees and families who are injured and killed in their service is too thinly veiled to be other than obvious. This is and has been for years a nationwide plan and scheme which they have implemented and practiced through their Claims Research Bureau (11-2933). Their every activity shown by the Record in this and other reported cases in which they had a hand belies any concern or interest on their part in ethical conduct, legal or otherwise. They make common cause with the grievance departments and courts of different states based upon charges and complaints instigated by them on trumped-up evidence, to the end that the only lawyers who are really trained and specialized properly to make them pay what these cases are worth be eliminated. They want their claim departments to have a free hand and to have any resulting legal opposition limited to lawyers who are unskilled in this highly specialized legal field. They are in so doing depriving their employees of the fruits and subverting the remedial and beneficent purposes of the Congress in the enactment of the Federal Employers' Liability Act. See also their similar activities in *In re Sizer*, 306 Mo. 356, 267 S.W. 922, 924, 925; *In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825, 67 A.L.R. 2d 827, 848; *In re Rerat*, 332 Minn. 1.

Furthermore, it was conceded Petitioner paid all clients all they were entitled to (Informant's Brief, Missouri Supreme Court p. 7).

The condemnation and punishment of Petitioner for association with McDonald (Opinion 6-11) although not included in the charges and wholly unsubstantiated as wrongful is another example of the lack of impartiality of

the Missouri Supreme Court and the essential unfairness of this procedure. This is discussed more fully hereinafter.

This case is a perfect example of the miscarriage of justice which is to be expected where one tribunal occupies the positions of investigator, judge and party, arbiter and advocate. The above examples of the Court's attitude demonstrates the unfairness and partisanship of a tribunal confident it is invested with arbitrary and unlimited power.

In the case of *Tumey* v. *Ohio*, 273 U.S. 510, 47 S. Ct. 437, in holding a mayor's court operated on a fee basis was unconstitutional, the Court said (l.c. 445):

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions; one partisan and the other judicial, necessarily involves a lack of due process or law in the trial of defendants charged with crime before him. City of Boston v. Baldwin, 139 Mass. 315, 1 N.E. 417; Florida ex rel. Colcord v. Young, 31 Fla. 594, 12 So. 673, 19 L.R.A. 636, 34 Am. St. Rep. 41."

Here the Missouri Supreme Court occupied two practically and seriously inconsistent positions, one partisan and the other judicial.

The record here shows the Missouri Supreme Court did not "hold the balance nice, clear and true between the State and the accused" and thereby denied the Petitioner due process.

The Court refused to give Petitioner the benefit of his admitted excellent character and high reputation although attested by an array of distinguished Judges and lawyers of the highest type (Opinion 3; 3-579-594; 11-2960-2962, Ex. 32-1; Ex. 32-8; 11-2964-76, 3047-49). Illustrative of this is the fact the Court chose to disbelieve Petitioner's

testimony and accept at full value the testimony of Deason before the Commissioner exactly contrary to his previous sworn affidavit, and when he was trying to blackmail Petitioner into paying him $2,500.00 to testify for him under threat he would otherwise testify for the Supreme Court's Committee (Comm. Rep. 196, 154; Opinion 18-20). Petitioner refused to submit to blackmail and Deason testified for the Supreme Court Committee.

The Commissioner (Comm. Rep. 154, 173, 196) and the Court (Opinion 16-18) likewise accepted at full value the testimony of Tuggle in preference to that of Petitioner although Tuggle was trying to blackmail Petitioner and his own investigator, Smith, into giving him $1,800.00 so he could apply the money on his indebtedness to a bank growing out of forged notes he had negotiated (4-135, 136, 925-26, 834, 870, 872, 838; 9-2363, 2369-70, 2392, 2397-98, 2405-06, 2415).

Also illustrative of the biased approach of the Commissioner and the Court is the fact that when the attorneys and representatives of the Supreme Court Committee and the railroad claim agents began approaching Petitioner's former clients, misrepresenting the facts so as to induce the former clients to believe Petitioner had overreached them in the settlement and that if they would cooperate with the Supreme Court Committee they could get back the money paid for investigation and some of them began trying to blackmail Petitioner under threats that unless paid they would testify against him, the Missouri Supreme Court would not permit Petitioner to even file a motion for protection of the Court against such action (11-2923-26, 2912, 2753, 2760, Ex. 31-67; 4-907, 1-161-164, 1-51; 4-908, 925-26, 873; 9-162, 10-2627, 2628-29, 2620; 11-2925-27, 2798; Ex. 31-72). It later was conceded the clients received everything due them in the settle-

ments (Informant's Brief, Supreme Court of Missouri, p. 7). Because on failing to obtain any protection from the Court Petitioner tried to refresh the recollection of his former clients of the actual facts of some years before orally or by letter the Court condemned him and used that as one of the main reasons for giving him the heaviest punishment within the power of the Court to give (Opinion 27-32, 37). The Court took this attitude although the Commissioner (11-2804) and the chief attorney for the Supreme Court Committee (11-2933) admitted during the hearings that they considered such action by Petitioner was justified under the circumstances.

Rules 5.03 and 5.08 (f), providing as they do for secrecy throughout the investigation and decision to file or not to file, and if the latter, to seal the record, not only invest the Court's Advisory Committee with invidious discriminatory powers in theory, but the record herein clearly shows that such powers were so exercised by the Committee in this proceeding. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064. On March 26, 1955, Carignan testified, *ex parte*, before the Committee to wholesale solicitation by him and others for the then regional counsel for the Railroad Brotherhood, who was a Missouri lawyer, giving his name and address (4-740 to 742). Seven months later, October 26, 1955, when he was cross-examined, he testified that he and said Missouri lawyer were still so engaged in these forbidden unethical practices, apparently without molestation by the Committee (4-815, 816). Moreover, the inference would seem to be conclusive that instead of filing a disbarment proceeding against him, the Committee allowed him and said Carignan to quietly resign their respective positions with the Brotherhood as Regional Counsel and local secretary. For, several years later the Committee filed an injunction suit against

the Brotherhood and its Missouri representatives which did not name either Carignan or said Missouri lawyer, but did name one Dan McGlynn, an Illinois lawyer, stating that he had been Regional Counsel for Missouri since March 1, 1956. The case was decided by the Missouri Supreme Court November 14, 1960, and cited herein (Op. 33). *Hulse* v. *Brotherhood of R. R. Trainmen et al.*, 340 S.W.2d 404, 410.

In the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 38, 41-42, 44, 70 S. Ct. 445, in holding that deportation cases must conform to the requirements of the Administrative Procedure Act, the Court said (l.c. 448):

> "The Executive Branch of the Federal Government also became concerned as to whether the structure and procedure of these bodies was conducive to fairness in the administrative process. President Roosevelt's Committee on Administrative Management in 1937 recommended complete separation of adjudicating functions and personnel from those having to do with investigation or prosecution. The President early in 1939 also directed the Attorney General to name 'a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation.' "

(l.c. 450:)

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. The President's Committee on Administrative Management voiced in 1937 the theme which, with variations in language, was reiterated throughout the legislative history of the Act. The Committee's report, which President Roosevelt transmitted to Con-

gress with his approval as 'a great document of permanent importance,' said:

"'* * * the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

"' Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.' Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management, 36-37 (1937)."

(l.c. 451:)

"And the Attorney General's Committee on Administrative Procedure, which divided as to the appropriate remedy, was unanimous that this evil existed. Its Final Report said: 'These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the

activity. Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. * * *' Rep. Atty. Gen. Comm. Ad. Proc. 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

"The Act before us adopts in general this recommended form of remedial action. * * *"

In the case of *Green* v. *United States*, 356 U.S. 165, 192-200, 78 S. Ct. 632, in a criminal contempt proceeding Mr. Justice Black wrote a dissenting opinion in which Chief Justice Warren and Justice Douglas concurred in which he expressed our views more forcefully and clearly than we could express them in these words (l.c. 651):

"When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of the process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. * * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they

prefer.' In re Murchison, 349 U.S. 133, 136-137, 75 S. Ct. 623, 625, 99 L. Ed. 942. Cf. Chambers v. State of Florida, 309 U.S. 227, 236-237, 60 S. Ct. 472, 476-477, 84 L. Ed. 716; Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749; In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

"The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inordinately sweeping and vague; it has been defined, for example, as 'any conduct that tends to bring the authority and administration of the law into disrespect or disregard.' It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that 'the trial judge has not abused his discretion.' But even at its best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. * * *"

The substantive scope of conduct warranting disbarment as ruled by the Missouri Supreme Court is inordinately sweeping and vague. The offense has the most-ill-defined and elastic contours under the term "professional misconduct." (Opinion p. 2), and "maintenance of the integrity of the profession and the courts." (Opinion 36).

In the Commissioner's Report (Approved by the Supreme Court, Opinion 24, 36, 38) it is said (Comm. Rep. 202):

> "Any misbehavior by respondent in his professional capacity is a proper matter for investigation and disbarment as a misdemeanor and malpractice in his professional capacity. In re Richards, 63 S.W.2d 672 (l.c. 678)."

In the case of *Dryer* v. *Illinois*, 187 U.S. 71, 23 S. Ct. 28, the Court said (l.c. 32):

> " 'When we speak', said Story, 'of a separation of the three great departments of Government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. Story, Const., 5th Ed., 393.' "

Here the whole power of the judicial department is being exercised by the same hands which exercise the whole power in the other two departments of legislative and executive in disbarment proceedings.

In *Ex parte Garland*, 4 Wall 333, 71 U.S. 366, the Court said (l.c. 373):

> "The framers of our political system had a full appreciation of the necessity of keeping separated and distinct the primary departments of the government. Mr. Hamilton, in the Seventy-Eighth number of the Federalist, says that he agrees with the maxim of

> Montesque, that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' "

In the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 179, 71 S. Ct. 624, in the concurring opinion of Mr. Justice Douglas, it is said (l.c. 652):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

Some alternatives to the oppressive and unfair procedure under Rule 5 of the Missouri Supreme Court are: Designate the State Bar Association as the prosecuting agency as in Illinois; leave it to the local bar associations or make it the duty of the State Attorney General, an independent officer not controlled by the court.

II.

The Supreme Court of Missouri Denied Petitioner Due Process of Law and the Equal Protection of the Law Guaranteed to Him by the Fourteenth Amendment to the Constitution of the United States, Based upon Its Erroneous Concept Concerning the Nature of the Rights of a Missouri Lawyer under His License to Practice Law, in That in Disbarment Proceedings It Adhered to and Followed Herein the Following Untenable Principles and Precepts, To-Wit:

(A) That a License to Practice Law Is Merely a Privilege Conferred upon a Lawyer by the Court and Not a Substantial Property Right, and May Be Taken Away Summarily by the Court.

Missouri adheres to the old theory that the Courts have inherent power and authority over the members of

the bar which theory has its roots in medieval English courts which reflected the absolute power of despotic kings. The power of the Courts to control and discipline the members of the bar was comparable to similar powers recognized in the master over his servants, slaves and beasts of burden, the father over his children and the schoolmaster over his pupils. It was informal, summary and absolute. The procedure adopted was not uniform, followed no fixed or ascertainable rules, and varied as the one administering the discipline in his uncontrolled, sound or capricious, judgment determined.

The view of the Supreme Court is expressed by the Court, *en Banc*, in the case of *In re Conner*, 357 Mo. 270, 207 S.W.2d 492, as follows (l.c. 499):

> "The privilege to practice law, quite unlike the right of a citizen to engage in an ordinary trade or business, carries no inherent right to continue in the practice. It is but a privilege given and continued to those who demonstrate mental attainment and moral character."

While neither the Commissioner nor the Court refers specifically to this concept their attitude and the necessary result of their rulings are based on such erroneous concept.

On page 202 of the Commissioner's Report, he states:

> "The Commissioner does not believe it is necessary to identify the specific charges of misconduct in the information, or the evidence of the misconduct offered by the Advisory Committee, with a particular Statute or Rule, to determine whether the words of the Statute or of the Rule are sufficiently broad to cover a particular charge or the evidence to support it. The statutory grounds for disbarment are not exclusive. Any misbehavior by Respondent in his professional capacity

is a proper matter for investigation and disbarment as a misdemeanor and malpractice in his professional capacity."

The Supreme Court in its Opinion approves and adopts the Commissioner's Report (Opinion 24, 36, 38).

The Missouri Supreme Court pursuing this concept convicted petitioner of permitting his clients to hire investigators on a contingent basis not charged in the information and not theretofore an offense.

The *Conner* case quoted, *supra*, is cited by the Missouri Supreme Court as the first and leading authority for its decision at the bottom of page 36 of the Opinion herein.

In the case of *Schware* v. *Board of Bar Exam. of State of N. M.*, 363 U.S. 232, 238-239, 77 S. Ct. 752, the Court said (l.c. 756):

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Dent v. State of West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. Cf. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692; Wieman v. Updegraff, 344 U.S. 183, 76 S. Ct. 215, 97 L. Ed. 216. And see Ex parte Secombe, 19 How. 9, 13, 15 L. Ed. 565. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Douglas v. Noble, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590; Cummings v. State of Missouri, 4 Wall. 277, 319-320, 18 L. Ed. 356. Cf. Nebbia v. People of State of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member

of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220."

In the case of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, the Court held the denial of a license to practice law to a qualified applicant constituted a denial of due process and of equal protection of the law because both arbitrary and discriminatory.

In the case of *Cohen* v. *Hurley*, 81 S. Ct. 954, the Court said:

"We granted certiorari because the case presented still another variant of the issues arising in the Konigsberg, Konigsberg v. State Bar, 365 U.S. ..... , 81 S. Ct. 997, and Anastaplo, In re Anastaplo, 365 U.S. ..... , 81 S. Ct. 978 cases.

"Starting from the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 752, 1 L. Ed. 2d 796, petitioner's claim that New York's disbarment of him was capricious rests essentially on two propositions: (1) that the Fourteenth Amendment forbade the State from making his refusal to answer the Inquiry's questions a per se ground for disbarment; (2) that in any event such a ground is not permissible when refusal to answer rests on a *bona fide* claim of a privilege against self-incrimination."

(B) That a Disbarment Proceeding Is a Mere Investigatory Proceeding or Inquisition and Not an Adversary Proceeding with Required Safeguards Such As Is Required in a Civil or Criminal Trial.

On page 205 of the Commissioner's report it is stated:

> "The controversy between the Advisory Committee and Respondent concerning whether this disciplinary proceeding is an adversary proceeding seems to have been resolved in cases such as In re Falzone, 220 S.W.2d 765, in which it was specifically held that a disbarment proceeding is not an adversary proceeding (l.c. 774)."

The Missouri Supreme Court adopted the Commissioner's Report (Opinion 24, 36, 38). Furthermore, the necessary effect of the Court's opinion affirming the commissioner and reaching a result by refusing to follow the rules of evidence, or other method of proof reasonably calculated to insure trustworthness, denying the right of confrontation of witnesses and effective cross-examination of witnesses, declining to permit Petitioner to even file a motion for protection against the misrepresentations of its officers, but denouncing and punishing Petitioner to the limit of its power for resisting and defending himself against the charges made against him, can be explained only in the light of the Court's position that this is not an adversary proceeding. We fail to see how a court proceeding could be more adversary.

In the case of *In re Summers*, 325 U.S. 561, 566-67, 568-69, 65 S. Ct. 1307, the Court said (l.c. 1310):

> "* * * We of course accept this authoritative commentary upon the law of Illinois as establishing for that state the non-judicial character of an application for admission to the bar. We take it that the law of Illinois treats the action of the Supreme Court on this

petition as a ministerial act which is performed by virtue of the judicial power, such as the appointment of a clerk or bailiff or the specification of the requirements of eligibility or the course of study for applicants for admission to the bar, rather than a judicial proceeding.

"For the purpose of determining whether the action of the Supreme Court of Illinois is denying Summers' petition for an order for admission to practice law in Illinois is a judgment in a judicial proceeding which involves a case or controversy reviewable in this Court under Article III, Sec. 2, Cl. 1, of the Constitution of the United States, we must for ourselves appraise the circumstances of the refusal. Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 259, 53 S. Ct. 345, 346, 77 L. Ed. 730, 87 A.L.R. 1191. Cf. Bridges v. California, 314 U.S. 252, 259, 260, 62 S. Ct. 190, 192, 86 L. Ed. 192; Nixon v. Condon, 286 U.S. 73, 88, 52 S. Ct. 484, 487, 76 L. Ed. 984, 88 A.L.R. 458; First National Bank of Hartford, Wis., v. Hartford, 273 U.S. 548, 552, 47 S. Ct. 462, 463, 71 L. Ed. 767, 59 A.L.R. 1; Traux v. Corrigan, 257 U.S. 312, 324, 42 S. Ct. 124, 126, 66 L. Ed. 254, 27 A.L.R. 375.

"A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treatise or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' Osborn v. Bank, 9 Wheat. 738, 819, 6 L. Ed. 204. * * *"

(l.c. 1312:)

"A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court."

In the case of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 257-8, 77 S. Ct. 722, the Court said (l.c. 725):

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study * * *."

See also on this subject *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. (U.S.) 205.

In the case of *May Department Stores Co.* v. *Brown*, 60 F. Supp. 735, the Court said (l.c. 740):

> "An adversary proceeding, as commonly understood, presupposes a compulsory attendance of parties at a judicial or quasi judicial proceeding and the forfeiture of some right for the failure to attend."

Black's Law Dictionary defines an "adversary proceeding" as:

> "One having opposing parties; contested, as distinguished from an ex parte application; one of which the party seeking relief has given legal warning to the other party, and afforded the latter an opportunity to contest it."

Clearly the proceedings here qualify as an adversary proceeding, and was conceded to be such by a Missouri Appellate Court in *In re Pate*, 107 S.W.2d 157, 162, although the Missouri Supreme Court has never so stated so far as we have been able to find.

(C) That in Such Proceeding the Court Is Not Bound by the Rules of Evidence but May Convict the Attorney by Evidence and Means in Violation of the Rules of Evidence.

Article V, Section 5, Missouri Constitution, 1945, so far as material provides:

"Section 5. The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights of the law relating to evidence, the oral examination of witnesses, * * *."

Rule 5.10 provides that each side is to have "a reasonable opportunity to present evidence according to the rules and principles of the law of evidence applicable to civil proceedings."

In the case of *In re Pate*, 232 Mo. App. 478, 119 S.W.2d 11, the Court said (l.c. 24):

"* * * While rights of great importance to the individual, and the bar as well, are litigated in disbarment cases, and loose procedure should not be countenanced, the courts have repeatedly held that the action being in the nature of an inquiry for the protection of the courts, the public and the profession, strict rules of procedure should be relaxed to the end that the fitness of an attorney to continue in the profession should be determined on the merits rather than on less worthy grounds."

In the case of *In re Conner*, 357 Mo. 270, 207 S.W.2d 492, the Court, in ruling a case prosecuted under this same Rule 5, said (l.c. 496):

"* * * To that end, permission to practice law and disbarment from further practice is within the Supreme Court's exclusive final cognizance. * * *"

"So deeply merged into the judicial department and the judicial function is the peculiar nature of the instant proceeding that the courts have widely recognized that procedural requirements applicable to ordinary actions at law and mere forms not affecting the merits in disbarment proceedings should not be permitted to hinder full protection of the courts and

the public, where all rights of full hearing, representation and cross-examination have been accorded. Leimer v. Hulse, supra, In re Keenan, 313 Mass. 186, 47 N.E.2d 12, In re Sparrow, supra. And confidence in the courts is always promoted where causes are disposed of upon the merits rather than upon procedural questions. Supreme Court Rule 1.28. In disbarment proceedings formal matters, required to be observed in strict law actions, are followed only insofar as the same are appropriate. Procedure in disbarment is seldom uniform, varies widely with the state or Federal jurisdiction in which the action is pending and seldom follows any local code of civil procedure. Generally, the judicial department of the jurisdiction involved adopts and uses any procedure it deems appropriate to disbarment. Leimer v. Hulse, supra, Rule 5, Missouri Supreme Court, In re Keenan, supra, 7 C.J.S., Attorney and Client, § 26; 5 Am. Juris., Attorneys at Law, p. 433, et seq."

(l.c. 499:)

"* * * For these reasons, in a proceeding of this character, considerations of public welfare must always be dominant. * * *"

That decision is a clear defiance of the rights of a Missouri lawyer to procedural due process and equal protection of law and denies him any rights of individual protection where it is considered the public interest is anywise involved.

The Conner case decided by the Supreme Court of Missouri is the leading case in the State, and has never been questioned or modified and is the first case cited by the Court at the bottom of page 11 of its Opinion herein as authority for the ruling approving the recommendations of the Commissioner and basing its opinion, in part, on pro ceedings in violation of the rules of evidence and the rights

of cross-examination of witnesses as pointed out hereinafter under Point II (D).

The authorities bearing on the issues of the Constitutional protection of the rights of individuals even in cases where an adverse public interest may be involved are discussed under Point I, *supra,* and in the interest of brevity will not be repeated here.

That the court and its Special Commissioner ignored and refused to follow the rules of evidence enjoined upon them both by the Missouri Constitution and by the Court's own Rule 5.10, or any other ordered or established system of proof possessing reasonable safeguards of trustworthiness, conclusively appears, (a) in holding that petitioner's guilt was proved by the testimony of Feezer relative to statements to him out of court by witness Mears, and by similar testimony of one Barrick of similar statements to him made by witnesses Beck and Goodner (Comm. Rep. 155, 156, 161, 174; 7-1741 *et seq.;* 11-2715 *et seq.*) whose adverse testimony was admitted only for the limited purpose of impeachment of witnesses Mears, Beck and Goodner which under the rules of evidence could affect only their credibility and could not be considered as proof against petitioner that such statements were true. *Hammond* v. *Schuerman Bldg., etc., Co.,* 352 Mo. 418, 177 S.W.2d 618; *Woelfle* v. *Conn. Mut. Life Ins. Co.,* 234 Mo. App. 135, 112 S.W.2d 865, 873; (b) in holding that petitioner's guilt was proved by the testimony of witnesses Carignan, Tuggle, Smith and Jarboe, insofar as their testimony favored the prosecution, when they testified *ex parte* in secret hearings when the Petitioner was not present or represented, but that their testimony given at a later date upon cross-examination by Petitioner's counsel at which time their testimony tended to prove his innocence was discarded *in toto* and would not be considered for any purpose (Comm.

Rep. 180; 4-723 *et seq.*, 600 *et seq.*, 950 *et seq.*) thereby denying Petitioner his right to face his accusers, to the aid and assistance of counsel, to his right of cross-examination and his right to his day in court; (c) in holding that his guilt was proved by supposed testimony not contained in the record on which Petitioner was tried where the Commissioner (Comm. Rep. 179-180) undertook to say that one O. C. Brown had given testimony adverse to Petitioner's contention when the said Brown testified in a proceeding which was not offered or received into the record made by the Commissioner which the Petitioner had no opportunity to disprove, qualify or disclaim, and this the Commissioner did in violation of the agenda which he ordered to be followed at the beginning of the hearings and later reiterated (1-2, 5, 6, 8, 7, 1729).

(D) Evidence.

In the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 179, 71 S. Ct. 624, in the concurring opinion of Mr. Justice Douglas, it is said (l.c. 652):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

In the case of *Rochin* v. *People of California*, 342 U.S. 165, 169, 72 S. Ct. 205, the Court said (l.c. 208):

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged

with the most heinous offenses.' Malinski v. People of State of New York, supra, 324 U.S. at pages 416-417, 65 S. Ct. at page 789."

In the case of *Bute* v. *People of State of Illinois,* 333 U.S. 640, 648, 68 S. Ct. 763, in discussing the requirements of due process of law the Court said (l.c. 768):

" 'The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land." Those principles are applicable alike in all the states and do not depend upon or vary with local legislation.' Hebert v. Louisiana, 272 U.S. 312, 316, 317, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A.L.R. 1101."

In the case of *Blackburn* v. *State of Alabama,* 361 U.S. 199, 206, 80 S. Ct. 274, the Court said (l.c. 280):

"It is also established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.' Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166."

Certainly the basic concepts of the rules of evidence which have here been violated such as hearsay testimony of alleged oral statements of persons not under oath, consideration of testimony not before the Commissioner and the Court as a part of the record and refusal to consider the effect of testimony elicited by counsel for Petitioner on cross-examination en masse and acceptance instead of

prior *ex parte* hearsay statements is violative of all our concepts of due process and a fair trial before a fair tribunal.

In the case of *Malinski* v. *People of State of New York*, 324 U.S. 401, 416-417, 65 S. Ct. 781, the Court said (l.c. 788):

> "And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

Where as here, there is a statutory requirement that the technical rules of evidence are to be observed even Administrative Agencies are required to follow such rules. *Opp Cotton Mills* v. *Administrator of W. and H. D., etc.*, 312 U.S. 126, 657, 61 S. Ct. 524, 537(21).

In the case of *Bridges* v. *Wixon*, 326 U.S. 135, 153-154, 65 S. Ct. 1443, the Court stated the law as follows (l.c. 1452):

> "The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. Hickory v. United States, 151 U.S. 303, 309, 14 S. Ct. 334, 336, 38 L. Ed. 170; United States v. Block, 2 Cir., 88 F.2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded."

We have pointed out elsewhere in these suggestions that the Missouri Supreme Court refused to apply the rules of evidence in the following several respects: (1) Considering evidence not offered and not before the Commissioner and the Court (Point II(D)). (2) Accepting secret *ex parte* statements and testimony, some of which was not under oath, at full value and refusing to consider and give any value to contradictory testimony elicited on subsequent cross-examination of the same witnesses by Petitioner's counsel (Point II(D)). (3) Accepting as substantive evidence hearsay testimony (Point II(D)). (4) Convicting Petitioner with notice of decisions in Minnesota, Wisconsin and California affecting one McDonald which he had never seen or heard of and under the law could not be charged with implied or constructive knowledge of (Point V). (5) Giving substantive force to testimony admissible only for impeachment purposes (Point II(D)).

(E) The Court Held Herein That under Missouri Procedure in Disbarment Cases the Commissioner and the Court Were Free to Adopt a Rule of Procedure Whereby They Would Accept As True All the Testimony of Witnesses Taken Ex Parte and at Hearings During the Secret Investigation When Petitioner Was Not Present or Represented and Disbelieve All of Their Testimony Given at a Time When Petitioner Was Present and Permitted to Exercise His Right of Cross-Examination.

It will be contended that Petitioner agreed that the *ex parte* testimony of such witnesses might be introduced in evidence if the witnesses were produced for cross-examination and this waived his right in this regard.

But Petitioner had no reason to suspect and did not agree that the Commissioner and Court should have the right to completely ignore his cross-examination (or listen to it only "with a deaf ear and a closed mind") and decide the case exactly as if he had not cross-examined. Under such procedure his opportunity of confrontation of the witnesses was mockery and a futile and idle thing, a mere gesture in imitation of the right of confrontation guaranteed by both the Constitution of the United States and of Missouri.

That the court and its Commissioner ignored and refused to follow the rules of evidence enjoined upon them both by the Missouri Constitution (Art. V, Section 5) and the Court's own Rule 5.10 conclusively appears from the following:

(a) They accepted as substantive proof the testimony of Feezer relative to statement to him out of Court and not under oath of witness Mears and accepted as substantive proof similar testimony of Barrick of similar statements made to him under similar circumstances by wit-

nesses Beck and Goodner (Comm. Rep. 155, 156, 161, 164, 174, 199, 206), whose testimony was admitted only for the limited purpose of impeachment of Witnesses Mears, Beck and Goodner which under the rules of evidence could affect only their credibility and could not lawfully be considered as proof against Petitioner that such statements were true. *Hammond* v. *Schuermann Bldg., etc., Co.*, 352 Mo. 418, 177 S.W.2d 618; *State* v. *Swain*, 68 Mo. 605; 70 C.J. 760. The Missouri Supreme Court accepted and adopted such findings of the Commissioner (Comm. Rep. 24, 36, 38).

(b) They decided Petitioner's guilt was proved by testimony of witnesses Carignan, Tuggle, Smith and Jarboe, insofar as their testimony favored the prosecution, when they testified *ex parte* in secret hearings when the Petitioner was not present or represented, but that their testimony given at a later time upon cross-examination by Petitioner's counsel at which time their testimony tended to prove his innocence was rejected *in toto* and not considered for any purpose, thereby denying Petitioner his right to face his accusers, to have the aid and assistance of counsel, and his right to the advantages and benefits of a cross-examination given its rightful and just consideration in determining the facts in the case, so as to give him his day in Court as intended by the framers of our Constitution (Comm. Rep. 196, 154, 162, 179, 180, 184, 199, 200, 204, 206; Opinion 24, 36, 38, 34, 35, 37). (c) They hold Petitioner's guilt was proved by the supposed testimony not contained in the record on which Petitioner was tried before the Commissioner and before the Missouri Supreme Court of one O. C. Brown (Comm. Rep. 179-80) said by the Commissioner to have given testimony adverse to Petitioner's contention when said Brown testified in a hearing which testimony was not offered or received into

the record made by the Commissioner, depriving Petitioner of the benefit of any testimony of said witness helpful to him and affording him no opportunity to disprove, qualify or disclaim such testimony, and this the Commissioner did in violation of his own agenda order on which Petitioner relied that he would only consider testimony made a part of the record and properly before him (1-2, 5, 6, 9; 8-1729).

In the case of *Crowell* v. *Benson*, 285 U.S. 22, 48, 52 S. Ct. 285, the Court said (l.c. 291):

> "Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431; The Chicago Junction Case, 264 U.S. 258, 263, 44 S. Ct. 317, 68 L. Ed. 667; United States v. Abilene & Southern Railway Co., 265 U.S. 274, 288, 44 S. Ct. 565, 68 L. Ed. 1016."

In the case of *State ex rel. Deweese* v. *Morris*, 359 Mo. 194, 221 S.W.2d 206, in an Administrative Procedure case, the Court said (l.c. 209):

> "The rule against hearsay evidence is based on the propriety of the confrontation and the cross-examination of the witnesses having personal knowledge of the facts adduced, and his veracity alone. (Citing authorities). The fact that technical rules of evidence do not control has been considered to permit of leading questions and other informalities but not to abrogate the fundamental rules of evidence. Novicki v. Department of Finance, 373 Ill. 342, 26 N.E.2d 130, 131 (1-4)."

In the case of *State* v. *Jackson*, 318 Mo. 1149, 2 S.W.2d 758, the Court said (l.c. 760):

> "A judgment cannot be based upon testimony produced by a witness who is not put under the pains and

> penalties of perjury. The party affected by the testimony has a right to that assurance that his rights are not jeopardized by reckless statements. 40 Cyc. 2410."

Here basing its findings on the unsworn *ex parte* heresay statements of witnesses and refusing to consider their sworn testimony contrary thereto when subjected to cross-examination is a denial of Petitioner's fundamental rights.

See also on this subject *Hungate* v. *Hudson*, 353 Mo. 944, 185 S.W.2d 646, 649 (6).

To accept fully the former *ex parte* unsworn statements of the witnesses without exception and refuse to consider any variation therefrom when the witnesses were under oath and subjected to cross-examination resulted in the utter deprivation and complete denial of the fundamental right of cross-examination guaranteed by the hearsay rule.

In the case of *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, the Court said (l.c. 507):

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

See authorities in footnote 13 to said decision supporting the above statement.

In the case of *Snyder* v. *Commonwealth of Massachusetts*, 191 U.S. 97, 116, 54 S. Ct. 330, the Court said (l.c. 336):

> "If the defendant in a federal court were to be denied the opportunity to be confronted with the 'witnesses against him', the denial of the privilege would

not be overlooked as immaterial because the evidence thus produced was persuasive of the defendant's guilt. In the same way, privileges, even though not explicit, may be obviously fundamental as to bring us to the same result."

In the case of *Powell* v. *State of Alabama*, 287 U.S. 45, 67-68, 53 S. Ct. 55, the Court in ruling the constitutional right to counsel the Court stated the law as follows (l.c 63):

"The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A.L.R. 1102), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in Twining v. New Jersey, 211 U.S. 78, 99, 29 S. Ct. 14, 19, 53 L. Ed. 97, where Mr. Justice Moody, speaking for the court, said that: '* * * It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process af law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'"

While the right to the aid of counsel was the right there involved that case is applicable here as the right to examine the witnesses against him is an equally fundamental right protected by the Fourteenth Amendment.

The law on this subject is well stated in *Smith* v. *Dental Products Co.*, 7 Cir., 168 F.2d 576, where the Court said (l.c. 519):

> "The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. In Morgan v. United States, 298 U.S. 468, at page 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288, the court said: 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016). Facts and circumstances which ought to be considered must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not

considered evidence or argument, it is manifest that the hearing has not been given.'"

The Missouri Supreme Court refuses to apply the statute of limitations in disbarment cases. *In re Woodward*, Mo. Sup., 300 S.W.2d 385, 387.

The Commissioner here specifically so ruled (Comm. Rep. 206). The Missouri Supreme Court approved (Opinion 24, 36, 38).

That denies due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722; *Schware* v. *Board of Bar Exam. of State of N. M.*, 353 U.S. 232, 246, 77 S. Ct. 752, 760.

(F) That Petitioner's Guilt Was Proved by Evidence of Conduct Which Was Not the Subject of Any Charge in the Information and Not Theretofore Declared an Offense or Misconduct in Permitting His Clients to Employ a Lay Investigator on a Contingent Basis.

There was no charge in the information of misconduct on the part of Petitioner in permitting his clients to contract with lay investigators on a contingent basis. Quite to the contrary, the charges are based upon a denial that the clients either hired or paid investigators. The evidence shows the injured clients, unable to work and with heavy medical expenses were unable to pay investigators and were obliged to employ them on a contingent basis.

In the case of *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, the Court said (l.c. 629):

> "Just as Conviction upon a charge not made would be sheer denial of due process, so it is a violation of due process to convict and punish a man without evidence of his guilt."

The Missouri Supreme Court held that Petitioner's guilt was proved based upon conduct which was not the subject of any charge in the Information and on which he was not tried, being conduct which had never theretofore been declared an offense or misconduct by an attorney by Missouri Statute, a rule of court or Missouri Decisions, but which conduct, on the contrary, was made permissible and approved both by a special Missouri Statute (Sec. 484.140, R.S. Mo. 1949) and also by Rules 4.12 and 4.13 providing for contingent fees, and specifically approved by the Missouri Supreme Court in *Curry* v. *Dahlberg*, 112 S.W.2d 345, the Court saying, p. 346, as to the propriety of an agreement by a client with a layman for the performance of services necessary or incident to the litigation:

> "* * * and it would have been entirely proper for him to have been employed as such by claimant, and to be paid whatever that kind of work was worth (or even to be paid on a contingent basis), * * *"

This the Court did by adopting as the Law of Missouri and applying it to Petitioner the holding of the New Jersey Supreme Court in *In re Frankel*, 20 N.J. 588, 120 A.2d 603, saying in part beginning on p. 35 of the opinion:

> "In the case of In re Frankel * * * a disbarment proceeding, a similar question was before the Court the claim was there made that the investigator was paid a certain per cent * * * for investigating the case. We quote what the Court there said *as applicable to the case before us* (120 A.2d l.c. 606):
>
> > 'This standard of remuneration does not comport with the hypothesis of investigational service, varying as it would in time and effort according to the exigencies of the particular case. * * * it is in its very nature repugnant to the theory of recompense for purely investigational endeavors'." (Emphasis supplied)

Incidentally, the Court misstated the facts in the New Jersey case in stating that "the investigator was paid a certain per cent of the amount the *client* received for investigating the case". The New Jersey Court in quoting from Frankel's answer he filed to the charges stated that he alleged in his answer that he paid Low "on various dates between December 23, 1952, and December 14, 1953, compensation for *bona fide*, substantial and valuable investigation services," in aid of his legal services at a rate of approximately 25% of his net fee. That the contingent arrangement violated the law in New Jersey but not in Missouri, as shown above, appears from the dissenting opinion in Frankel:

> "And the contingent contract between respondent and Low was contrary to the public policy of this state (citing several New Jersey cases) because in violation of N.J.S.A. 2A, 170-83 * * *"

Also, p. 616, he said that the Court's code of ethics "proscribes such an arrangement even if in fact Low's services had been entirely in the investigation of cases." For the Missouri Court suddenly to adopt the Frankel decision based upon the statutes and public policy of New Jersey which was contrary to Missouri law, both statutory and court-made, was clearly to convict Petitioner not only retroactively but upon a charge on which he was not tried and on conduct which was not improper at the time it occurred, which "would be sheer denial of due process". *De Jonge* v. *Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259; *Schneiderman* v. *United States*, 320 U.S. 118, 160, 63 S. Ct. 1353; *Cummings* v. *Missouri*, 4 Wall. 27, 71 U.S. 356; *Ex parte Garland*, 4 Wall. 333, 71 U.S. 366.

Incidentally, only a glance at the evidence and admitted facts in *In re Frankel* (120 A.2d 603), on which the Court so heavily relied (Op. 35) will suffice to convince

the most wary that it does not even superficially resemble Petitioner's case.

In view of the Court's approval herein of the foregoing unorthodox procedures and bases for determining Petitioner's guilt, which would be regarded as procedural and substantive heresy under the due process and equal protection clauses of the 14th Amendment to the Federal Constitution in any other case or proceeding, civil or criminal in character, it must follow as of course that the court found that to this extent "strict rules of procedure should be relaxed", and that Petitioner's guilt was "determined on the merits rather than on less worthy grounds" vouchsafed in the rules of evidence. *In re Pate*, 119 S.W.2d 11, 24. Also, that it regarded such bases of proof though not permissible "in strict law actions", were "appropriate" to be followed "in disbarment proceedings", and the Court would adopt it as it "adopts and uses any procedure it deems appropriate to disbarment". And it would do this especially since "the basic right of an attorney informed against cannot reasonably be of a higher order, or more sacred, than the right of the Court and the public to be protected from any professional misconduct * * *" *In re Conner*, 207 S.W.2d 492, 496, 497. Moreover, the Court must have concluded that it was well within its rights in suddenly abandoning its former decisions and repudiating a Missouri Statute making contingent fees lawful, and adopt the New Jersey Statutes and public policy in the Frankel case, and convict Petitioner retroactively on the authority of *In re Sparrow*, 90 S.W.2d 401, 404, where the Court said a sufficient answer to the claim that the court was applying a new rule retroactively to prior conduct "is that the question of moral fitness or due observance of professional ethics is necessarily determinable upon pre-existing facts * * * '* * * by their fruits ye shall know

them'. Matt. Vii, 20. So, assuredly there is present no real question regarding retroactivity."

III.

Under the Settled Principles in Disbarment Cases the Record and Evidence Were Insufficient to Prove Petitioner's Guilt, So That His Conviction Herein Is in Violation of His Constitutional Rights under the Fourteenth Amendment to the Constitution of the United States.

Missouri has always applied the rule that where a license to pursue a profession for occupation requiring long study and preparation as well as peculiar skills and integrity will not be issued to an individual unless and until he has passed a rigorous examination by a legislative or judicial board and certified by it to possess the requisite learning, skill and traits of character appertaining thereto, that such license cannot be revoked arbitrarily "or at pleasure, or in hostility or with either passion or prejudice. * * * and only in a clear case for weighty reasons and on clear proof". This rule is applied particularly in disbarment proceedings. *In re Conner,* 357 Mo. 270, 207 S.W.2d 492, 498; *In re Sceiser,* 294 S.W.2d 656. This court follows the same rule and has applied it in particular in denaturalization cases based upon the similar facts that in a prior proceeding by which the alien had acquired his status of citizenship there had been a determination in his favor that he possessed the very qualifications which were the subject of attack in the denaturalization proceedings. *Schneiderman* v. *United States,* 320 U.S. 118, 122, 125, 63 S. Ct. 1333, 1335-37; *Baumgartner* v. *United States,* 322 U.S. 665, 64 S. Ct. 1240; *Knauer* v. *United States,* 348 U.S. 654, 66 S. Ct. 1304. In this regard this Court in *Schneiderman,* p. 145 (320 U.S.), 1337 (63 S. Ct.),

"This is so because rights once conferred should not be lightly revoked. And more especially is this true

> when the rights are precious and when they are conferred by solemn adjudication, * * * the Government's evidence in this case does not measure up to this exacting standard."

Moreover, the Missouri Rule goes one step further. Not only is a high degree of proof required based upon the initial determination that he possessed the necessary qualities and character at the time he was issued a license to practice law, but where it is shown that at the time the charges are made and the attempt to revoke his license that he had a good reputation for truth, veracity, and ethical conduct, such showing in and of itself is strong evidence of his innocence, and may not be overturned by contrary testimony of disreputable and unscrupulous clients and others, either of an equivocal nature, or where such persons are impeached and discredited and shown to have ulterior motives for testifying against the lawyer. *In re Frith*, 233 S.W.2d 707, 717; *In re Mason*, 203 S.W.2d 750, 769. The Court in *Mason*, 769, said that such charges "can be easily made by unscrupulous persons; and evidence in support thereof, many times, is not easily refuted, except by evidence of the good moral character of the attorney charged." Based upon the testimony of many judges and other lawyers reviewed by the Special Commissioner (Comm. Rep. 17-19) he made the finding (Rep. 152):

> "His reputation for truth and veracity has been good, as well as his reputation for ethical conduct as a lawyer."

The Court so concedes in the opinion (Op. p. 3).

This Court also in the three cases above cited lays down the same stringent rule, the Court saying, p. 125 (320 U.S.), p. 1336 (63 S. Ct.),

> "To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'—'it cannot be done

upon a bare preponderance of evidence which leaves the issue in doubt' (citing cases)."

It was shown in *Schneiderman* that a very strong showing was made in support of the Government's case for revoking Schneiderman's certificate of citizenship which was sustained by the District Court and affirmed by the Circuit Court of Appeals as not being "clearly erroneous". At page 155 (320 U.S.) note this language:

> "* * * the Government admits the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof."

And, p. 158:

> "Under the conflicting evidence in this case we cannot say that the Government has proved by such a preponderance of the evidence that the issue is not in doubt * * * we conclude that the Government has not carried its burden of proving by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt', * * * we hold only that where two interpretations of an organization program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, * * * is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation. So uncertain a chain of proof does not add up to the requisite 'clear, unequivocal, and convincing' evidence for setting aside a naturalization decree."

Accordingly, Petitioner, with his conceded good reputation, and whose testimony was entirely consistent with proper and ethical conduct in which he was supported by a large number of his former clients at the very worst created

a conflict with the testimony of a few disgruntled and thoroughly discredited clients, so that as a matter of law he was entitled to a judgment of acquittal, and to find him guilty upon such a record was arbitrary, capricious and discriminatory, and deprived him of due process and equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution. *Niemotko* v. *State of Maryland*, 340 U.S. 268, 71 S. Ct. 325, 327; *Schware* v. *Board of Bar Examiners*, 353 U.S. 237, 77 S. Ct. 752; *Thompson* v. *City of Louisville*, 80 S. Ct. 624, 628.

As pointed out under the sub-head of this Brief immediately preceding, a license to practice law can be revoked only in a "clear case and for weighty reasons and on clear proof." *In re Conner*, 357 Mo. 270; 207 S.W.2d 492, 498.

Furthermore, where the situation exists, as here, that the accused lawyer is shown to have a good moral character and excellent reputation for integrity and ethical conduct in the practice of his profession, his license may not be taken away upon testimony of discredited witnesses shown to have ulterior motives, whose testimony is self-contradictory and who are otherwise impeached, as is the situation in the present case.

Petitioner's testimony was supported by a large number of his former clients whose testimony was clear and unimpeached. Upon this record it must be clear to any impartial tribunal that the prosecution failed to establish the charges against Petitioner by the required clear proof.

In this connection, please see and consider our argument immediately preceding.

In the case of *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, the Court said (l.c. 628):

"The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process."

(l.c. 629:)

"Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

In the case of *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 271-272, 79 S. Ct. 1173, the Court said (l.c. 1178):

"The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as its does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97; Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5. This principle was well stated in Niemotko v. State of Maryland, 340 U.S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267:

'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'"

In the case of *Milk Wagon Drivers Union, etc.*, v. *Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S. Ct. 552, the Court said (l.c. 555):

"Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state

courts where a claim of constitutionality is effectively made."

Under Part II of our Statement of Facts hereinabove we have summarized the evidence and confidently assert that we have there demonstrated there is no competent and substantial evidence to sustain Petitioner's conviction of the charges made.

We have there pointed out the evidence as to his good moral character and excellent reputation which compelled the Commissioner and the Missouri Supreme Court to find his reputation for truth and veracity as well as his reputation for ethical conduct as a lawyer was good (Comm. Rep. 17-19, Opinion 3).

That subject is further discussed hereunder above, where it is pointed out that only in a clear case for weighty reasons and on clear proof will disbarment be ordered (*In re Conner*, 357 Mo. 270, 207 S.W.2d 492, 498); that a lawyer with a good reputation will not be disbarred on the testimony, as here, of discredited witnesses, with selfish motives giving conflicting and irreconcilable testimony.

In every instance in which he accepted employment the client first personally contacted Petitioner either going to Kansas City to see him or by letter or telephone making an appointment to see him (8-1902, 1906). Petitioner testified positively that none of the cases involved were solicited by him (The Commissioner found he did not solicit or hire solicitors, Comm. Rep. 201) or by any of the alleged solicitors (8-1902, 1906, 1907; 8-2217; 9-2298).

On page 12 of the Opinion of the Supreme Court of Missouri challenges our statement that Hice was the only witness who testified that his case was solicited. The Court then selects out the names of Carignan, Tuggle and

Deason and later Bouse as being exceptions to and disproving our statement.

The record shows Carignan (4-725, 726, 762); Tuggle (4-892, 894, 895); Deason (1-110-111, 113, 121) and Bouse (11-3009-3084, 3020, Ex. 6-20) all gave positive testimony that their cases were not solicited.

Other former clients, including Bouse, testifying their cases were not solicited were: Bouse (11-3005-3011); Dunham (6-1461); Brinker (for himself and Simmons, deceased) (7-1799-1801); Beck (6-1404-1407); Goodner (7-1163-1166); E. E. Jennings (7-1589-1593); Thomas (6-1349, 1350, 1379); Mears (6-1522, 1525-1526, Ex. 16-25); Harris (5-1227, 1228, 1234, 1235); Jarboe (4-988, 984-988); Whinery (5-1172-1177) and Hunnicutt (6-1292).

In no case where he was employed did Petitioner ever have any previous contacts in the case with the person later hired by the client as an investigator (5-1079, 1082, 1097).

In no case did Petitioner recommend a particular investigator to a client (5-1079-1097).

In no case did Petitioner ever tell the client what percentage to pay the investigator but he customarily told the client to make the best deal he could (2-518, 519; 6-1409-10, 1376; 7-1666-69).

The clients were unable to employ lawyers or investigators except on a contingent basis (Comm. Rep. 125-126).

The investigators performed in every case so that every case was adequately investigated and good results obtained (2-482-83; 8-2221; Comm. Rep. 185), as follows:

The Work Product of the Investigators.

At the instance of Counsel for the Court's Advisory Committee, Petitioner was required to testify during the

early hearings before the Special Commissioner to the investigative endeavors of the respective investigators in the several cases involved in the charges, based upon papers or correspondence in his files and upon his recollection of communications with his clients and their investigators (1-8, 56-57). Accordingly, Petitioner went through his files and produced all papers such as statements of witnesses, photographs, plats, reports, correspondence and notes relating to the work product of the investigators which were marked as exhibits and testified at length concerning them and any other item of investigation he was able to recall after the lapse of many years. His testimony on this subject is tabulated according to the name of the client, the name of the investigator, where found in the record and exhibits, as follows, to wit:

Client	Investigator	Where Found	Exhibits
Hice	Fenn	1-58 to 75	1-1 to 1-4
Taylor	Fenn	1-78 to 105, 198-202	3-1 to 9, 11, 12, 15
Mrs. Williams	Fenn	1-203 to 225	4-1 to 4, 10
Bell	Fenn	1-227 to 243	5-1 to 4
Bouse	Fenn	1-244 to 263	6-1 to 13
Dunham	Fenn	1-264 to 273	7-1 to 8, 16
Brinker	Fenn	1-273 to 282	8-1 to 7
Simmons	Fenn	1-283 to 300	9-1 to 18
Beck	Fenn	1-303 to 317	10-1 to 19, 30
Goodner	Fenn	1-318 to 342	11-1 to 13
E. E. Jennings	Fenn & C. C. Jennings	1-342 to 354	12-1 to 7, 14
Marie Francis	Fenn	2-356 to 374	13-1 to 8
Hunnicutt	Fenn	2-375 to 392	14-1 to 11
Thomas	Fenn	2-392 to 412	15-1 to 17
Mears	Fenn	2-413 to 427	16-1 to 12, 18, 29
Donaho	Fenn	2-427 to 454	17-1 to 8, 10

Tipton	Fenn	2-454 to 461	18-1 to 8
C. C. Jennings	Yearsley	2-461 to 484	19-1 to 9
Whinery	Yearsley	2-487 to 499	20-1 to 4, 12
Bockting	Yearsley	2-500 to 515	21-1 to 5
Harris	Yearsley	2-515 to 523	22-1, 2
Deason	Brown	2-523 to 543	23-1 to 11
Mrs. Jarboe	Brown	2-543 to 561	24-1 to 8
Carignan	J. R. Smith	2-561 to 576	25-1 to 6
Tuggle	J. R. Smith	5-1099 to 1125	26-1 to 10, 16, 17, 18, 22
Pauline Brown	C. C. Jennings	5-1125 to 1143	27-1 to 15

The following clients appeared before the Special Commissioner and testified to the work product of their respective investigators, as follows:

Client	Investigator	Where Found
Whinery	Yearsley	5-1176, 1177, 1201 to 1207, 1215, 1216, 1220
Harris	Yearsley	5-1236, 1247, 1268 to 1272
Hunicutt	Fenn	6-1299 to 1315, 1322, 1323, 1331 to 1333, 1344
Thomas	Fenn	6-1355 to 1371, 1387-1389, 1391 to 1399
Beck	Fenn	6-1413 to 1422, 1434, 1442, 1443
Dunham	Fenn	6-1471 to 1481, 1488, 1504 to 1507, 1509
Mears	Fenn	6-1518, 1522, 1528, 1529, 1534 to 1543, 1548
E. E. Jennings	Fenn & C. C. Jennings	7-1600 to 1611
Goodner	Fenn	7-1675 to 1683, 1724-1726
Brinker	Fenn	7-1810 to 1815, 1817, 1821, 1829
Simmons	Fenn	4-969, 992, 993, 1002, 1007, 1018, 1022, 1025, 1026
Mrs. Jarboe	Brown	7-1815
Bouse (deposition)	Fenn	11-2996, 3002, 3010, 3011, 3022, 3023
Hice (deposition)	Fenn	1-34A

Carignan, although not present when Smith made various investigations at different points, being confined to the hospital a large part of the time, did freely admit the necessity for the investigation that Smith was making in his case (4-774, 775).

Smith testified to the investigation he made for Carignan and Tuggle:

Carignan	4-687 to 694, 703 to 706
Tuggle	4-662 to 676

All of the former clients were satisfied and not one was making any complaint until contacted by the railroad claim agents and the attorneys and representatives of the Missouri Supreme Court Committee, and by them told this was not a railroad investigation and told or it was suggested to them Petitioner had overreached them and they had money coming to them from their railroad settlements (8-2219; 10-2620, 2675; 11-2827, 2727; 10-2627, 2620; 11-2925-26; 10-2627; 11-2928, 2935).

Petitioner was clearly justified in contacting his former clients and by letter and orally warning them against the misrepresentations of the railroad claim agents and the attorneys and representatives of the Missouri Supreme Court Committee. Statement, Part II, supra, and especially sub-head "Misrepresentations". During the trial the Commissioner (11-2804) and chief attorney for the Supreme Court Committee (11-2933, 2934) thought Petitioner was justified in so doing but the Commissioner later changed his mind (Comm. Rep. 198, 199) and the Missouri Supreme Court concluded otherwise (Opinion 27).

The denial of this right violates petitioner's constitutional right of free speech under the First and Fourteenth Amendments to the Constitution of the United States.

Under our Summary following Part II of our Statement of Facts of the testimony of the Witnesses selected out by the Supreme Court of Missouri on page 12 of its Opinion we confidently believe we have completely impeached such witnesses and on cross-examination got from them the truth and thereby proved the falsity of their previous secret, *ex parte* statements and testimony taken by the representatives of the Supreme Court Committee, and totally destroyed any probative force it might otherwise have had.

While the Court says (Opinion 24): "We could go on and on discussing other cases", we say without fear of contradiction that the cases specially selected and discussed were by the Court selected as the strongest cases to support the result reached by the Missouri Supreme Court, and the others are all subject to the same frailties possessed by those treated by the Court.

In the case of *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 74, 75, 56 S. Ct. 720, in the concurring decision of Mr. Justice Brandeis in reviewing an order of the United States Secretary of Agriculture, Justice Brandeis stated the law as follows (l.c. 735):

> "It may set aside an order for lack of findings necessary to support it, Florida v. United States, 282 U.S. 194, 212-215, 51 S. Ct. 119, 75 L. Ed. 291; or because findings were made without evidence to support them, New England Divisions Case, 261 U.S. 184, 203, 43 S. Ct. 270, 67 L. Ed. 605; Chicago Junction Case, 264 U.S. 258, 262-266, 44 S. Ct. 317, 68 L. Ed. 667; or because the evidence was such 'that it was impossible for a fairminded board to come to the result which was reached,' San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 442, 23 S. Ct. 571, 572, 47 L. Ed. 892; or because the order was based on evidence not legally cognizable, United States v. Abilene & Southern Ry.,

265 U.S. 274, 286-290, 44 S. Ct. 565, 68 L. Ed. 1016; or because facts and circumstances which ought to have been considered were excluded from consideration, Interstate Commerce Commission v. Northern Pacific Ry., 216 U.S. 538, 544, 545, 30 S. Ct. 417, 54 L. Ed. 608; Northern Pacific Ry. v. Department of Public Works, 268 U.S. 39, 44, 45 S. Ct. 412, 69 L. Ed. 836; or because facts and circumstances were considered which could not legally influence the conclusion, Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 46, 47, 32 S. Ct. 22, 56 L. Ed. 83; Florida East Coast Ry. v. United States, 234 U.S. 167, 187, 34 S. Ct. 867, 58 L. Ed. 1267."

The opinion and judgment herein are vulnerable on all the grounds set forth in said concurring opinion.

IV.

In Condemning and Punishing Petitioner (Opinion 8, 9, 10, 11) **Because of His Association in Litigation with McDonald After McDonald Had Been Reinstated by the Supreme Court of Minnesota As a Person Fit to Practice Law the Missouri Supreme Court Abridged and Denied His Indispensable Liberty of Association in Violation of His Constitutional Rights under the First and Fourteenth Amendments to the Constitution of the United States.**

The facts are set out under the sub-heading entitled "Association with McDonald" under part II of the statement of facts entitled: "The Facts Material to the Questions Presented," and will not be repeated here.

McDonald received no money whatever out of the proceeds of the settlement, or out of Randolph's fee in any case upon which a charge has been made against Petitioner.

The Missouri Supreme Court charges Petitioner with knowledge of the conduct and activities of McDonald and one Dahl as evidenced by decisions in Minnesota, Wis-

consin and California which he never saw or heard of until after these charges were preferred (Opinion 6-11; 8-1884, 1885; 10-2661, 2656).

The Court will take judicial notice that Minneapolis, Minnesota, the States of Wisconsin and California are all more than 500 miles from Kansas City, and in foreign jurisdictions whose decisions are not reported in the Southwestern Reporter where the Missouri cases appear.

From 1931 to 1940 Petitioner was a member of a firm of corporation lawyers and had no association with McDonald or DeParcq and had no reason to keep track of them or their activities (8-1884, 1883, Comm. Rep. 31). There is no evidence any such decisions were given any publicity in the Kansas City area.

Petitioner's "association with McDonald was interrupted for about twelve years beginning in 1931, when he formed a partnership with McVey and others, until about 1942, after he dissolved partnership with McVey". (Opinion 6, 9; 8-1884, 1887). "The charges against respondent concern cases that were handled after 1940." (Opinion 10). So far as any new association with McDonald is involved it began in the summer of 1942 (Comm. Rep. 4, Chronology table 8-1896; Ex. 31-38, p. 24).

McDonald was disbarred by the Supreme Court of Minnesota in December, 1938, with leave to apply for reinstatement after three years. The Court reinstated McDonald on October 8, 1940, "as a member of the Bar in good standing." (Opinion 7-8). McDonald had been reinstated and practicing for more than two and one-half years when he contacted Petitioner in Kansas City in the summer of 1943 (8-1896; Comm. Rep. 4).

In the case of *Roth* v. *State Bar*, 40 Cal. 2d 307, 253 P.2d 969, the court in denying reinstatement to a disbarred attorney said (l.c. 972):

> "This court repeatedly has held that 'the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character.' (Citing cases). In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline. Feinstein v. State Bar, supra, 39 Cal. 2d 541, 248 P.2d 3, and cases cited."

Having met the stricter standards of reinstatement McDonald was reinstated "as a member of the bar in good standing." No one would think of condemning a lawyer for associating with another lawyer who had just been admitted to the bar as an original proposition, yet the Supreme Court of Missouri condemns this Petitioner for associating with McDonald after he had met the stricter tests and been reinstated. This is clearly arbitrary and discriminatory action in violation of due process and equal protection of the First and Fourteenth Amendments to the Constitution of the United States.

There was no reason for and no duty on Petitioner to examine the decisions of Minnesota, Wisconsin and California for cases involving McDonald or DeParcq at any time and especially during the twelve years he had no contacts with or interest in either of them.

In the case of *Hatcher* v. *Hall*, Mo. Sup., 292 S.W.2d 619, the Court said (l.c. 625):

> "However, one is put on inquiry and charged with notice of the facts which would be disclosed thereby, only when '"the inquiry becomes a duty, and the failure to make it a negligent omission"' (Laughlin v. Findlay, 324 Mo. 1021, 1024. 25 S.W.2d 464, 465(1)); or, as otherwise stated, '"(w)here there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge."' * * *"

In December, 1924, the opinion of Judge McGee was called to Petitioner's attention during a trial at Independence, Missouri (Opinion 9). Shortly afterwards Petitioner learned that Judge McGee had been caught accepting a bribe and committed suicide to avoid arrest (Ex. 31-38, p. 13). Vol. 4, F.2d., P. VIII, note 16, states Judge McGee "died February 15, 1925." After that Petitioner thought little about the matter. In about 1937, Petitioner received through the mail a newspaper article of a Minnesota newspaper (Ex. 31-29, 8-1882) reporting an investigation of McDonald and a Commissioner's report praising him and acquitting him of the charges filed against him (8-1884, 1883; Comm. Rep. 31).

In 1943 when Petitioner renewed some business relations with McDonald, the latter had been fully reinstated as a person qualified and fit to practice law and had been practicing for more than two and one-half years.

The Missouri Supreme Court assumes contrary to the record and without any support in the evidence for such statement that Petitioner knew from 1924 to 1930 and thereafter that McDonald gave one-third of his fee "to the investigators who were in fact solicitors." (Opinion 9).

Petitioner's testimony, which was undisputed that he learned from McDonald and others handling such cases and from his own experience that the cost of investigation in such cases amounted to about one-third of the attorney's fee (8-863, 5-1083-85). That was a general statement covering all of the cost of investigation, not just the investigator's compensation. There are usually many other items of expense to an investigation.

Petitioner testified that he did not know that McDonald paid his investigators in any instance one-third of his fee as compensation for investigation until Fenn testified during the present proceedings (5-1085; 8-1892; 10-2665-66; 10-2666-67). He testified there was nothing in the files he received from McDonald indicating any of the cases had been solicited (8-1887-88, 1905). This evidence stood uncontradicted.

When boiled down to its essentials the real ground for the Court's condemnation of Petitioner is for associating with McDonald, who was shown to have had a bad reputation before 1940, and through him getting acquainted with several investigators who had worked for McDonald and who apparently were thought to be runners for McDonald.

In the case of *Oyama* v. *State of California,* 332 U.S. 633, 68 S. Ct. 269, a writ of certiorari was issued to the Supreme Court of California, the Court said (l.c. 270):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent to inquire not merely whether those rights are asserted, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Schware* v. *Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 246, 77 S. Ct. 752, in a certiorari pro-

ceeding to review the denial of an application to take an examination for admission to practice law, the Court said (l.c. 760):

> "* * * Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. As this Court declared in Wieman v. Updegraff, 344 U.S. 183, 191, 73 S. Ct. 215, 219, 97 L. Ed. 216: 'Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.' Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 136, 71 S. Ct. 624, 630, 95 L. Ed. 817. And finally, there is no suggestion that Schware was affiliated with the Communist Party after 1940—more than 15 years ago. We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character."

See also on this subject *In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825, 67 A.L.R. 2d 827, 834.

Here the Missouri Supreme Court automatically assumed that Petitioner shared any evil purposes or participated in any illegal conduct merely because of association with McDonald and the investigators he at one time employed. Here this indiscriminate classification of Petitioner's innocent activity with wrongful conduct of McDonald or the investigators should fall as assertion of arbitrary power.

In the case of *Louisiana* v. *National Ass'n for Advance. of Col. People*, 81 S. Ct. the Court said (l.c. 1335):

> "* * * We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States

by the Due Process Clause of the Fourteenth Amendment. Id., 357 U.S. at page 460, 78 S. Ct. at page 1171; Bates v. City of Little Rock, 361 U.S. 516, 523, 80 S. Ct. 412, 416, 4 L. Ed. 2d 480. * * *"

See also on this subject the joint concurring opinion of Justices Black and Douglas and cases therein cited in *Bates* v. *City of Little Rock,* 361 U.S. 516, 527-28, 80 S. Ct. 412, 419.

In the case of *Lerner* v. *Casey,* 357 U.S. 399, 412, 413, 78 S. Ct. 1324, the Court said (l.c. 1326):

"Among the liberties of the citizens that are guaranteed by the Fourteenth Amendent are those contained in the First Amendment. Stromberg v. People of State of California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117; De Jonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278; Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711; Staub v. City of Baxley, 355 U.S. 313, 321, 78 S. Ct. 277, 281, 2 L. Ed. 2d 302. These include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation. * * *"

In the case of *Slouchower* v. *Board of Higher Ed. of City of N. Y.,* 350 U.S. 551, 556, 558-9, 76 S. Ct. 637, the Court said (l.c. 640):

"* * * In Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. * * *"

(l.c. 641:)

> "Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of § 903 into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093."

Here no inference of guilt was possible from Petitioner's association with McDonald prior to 1931, since subsequently thereto he had been disbarred for three years and then at the end of that time reinstated as qualified and fit to practice law (which finding is conclusive of the matter) and there was no evidence whatever that since that time he had not obeyed the code of ethics to the letter. The action of the Missouri Supreme Court was arbitrary under these circumstances and denied Petitioner his constitutional rights under the Fourteenth and First Amendments to the Constitution of the United States.

In the case of *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 262, 267-68, 273-74, 77 S. Ct. 722, in a certiorari proceeding this Court in reversing the ruling of the Supreme Court of California refusing to certify Petitioner for admission to the bar, the Court said (l.c. 728):

> "Konigsberg claims that he established his good moral character by overwhelming evidence and carried the burden of proving that he does not advocate

overthrow of the Government. He contends here, as he did in the California court, that there is no evidence in the record which rationally supports a finding of doubt about his character or loyalty. If this contention is correct, he has been denied the right to practice law although there was no basis for the finding that he failed to meet the qualifications which the State demands of a person seeking to become a lawyer. If this is true, California's refusal to admit him is a denial of due process and of equal protection of the laws because both arbitrary and discriminatory. After examination of the record, we are compelled to agree with Konigsberg that the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his application for admission to the California Bar."

(l.c. 730:)

"Despite Konigsberg's forceful showing of good moral character and the fact that there is no evidence that he has ever been convicted of any crime or has ever done anything base or depraved, the State nevertheless argues that substantial doubts were raised about his character by: (1) the testimony of an ex-Communist that Konigsberg had attended meetings of a Communist Party unit in 1941; (2) his criticism of certain public officials and their policies; and (3) his refusal to answer certain questions about his political associations and beliefs. When these items are analyzed, we believe that it cannot rationally be said that they support substantial doubts about Konigsberg's moral fitness to practice law."

(l.c. 733:)

"We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or

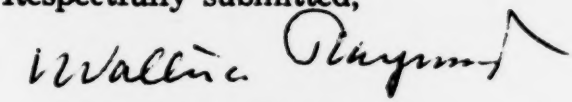
association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar. In this case we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action."

The reinstatement of McDonald in October, 1940, by the Supreme Court of Minnesota conclusively established his fitness to practice at that time. There is here no evidence of his misconduct since that time. To condemn Petitioner for cases handled after 1942 because of prior association with McDonald constitutes arbitrary and discriminatory action with no evidence in the record which rationally supports such finding.

CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to the Supreme Court of Missouri should be granted.

Respectfully submitted,



WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Petitioner.

EXHIBIT A.

IN THE SUPREME COURT OF MISSOURI
EN BANC

SEPTEMBER SESSION, 1956

In re:
C. A. RANDOLPH } No. 45936

Information.

Come now Fred B. Hulse, O. W. Watkins, James M. Reeves, Charles M. Blackmar and Forrest M. Hemker, and state to the Court that they are the duly appointed, qualified and acting members of the Advisory Committee, created by Rule 5 of the Supreme Court of Missouri, and are hereinafter termed "Informants".

Informants further state that they did heretofore obtain leave to file this Information in this Court against the above named C. A. Randolph, hereinafter referred to as the "Accused"; and the Informants inform the Court and charge:

That the accused Attorney, C. A. Randolph, is now and was at all times herein mentioned a member of the Bar of the State of Missouri, and is and was at all such times, a duly licensed Attorney at Law, admitted to practice the profession of law in and before all the Courts of this State, and as such is and was at all times herein mentioned, in the practice of his profession throughout the State of Missouri, and is and was at all such times, a resident of and maintained a law office in the City of Kansas City, Jackson County, Missouri.

That subsequent to their respective appointment and qualification, these Informants, sitting in lieu of the Bar Committee of the Sixteenth Judicial Circuit of Missouri, in which the said City of Kansas City is situated, at the request of the General Chairman of Bar Committees, upon due notice to the accused, held formal hearings in the manner provided by the Rules of the Supreme Court of Missouri, of alleged misconduct of the accused in the practice of his profession as a licensed attorney at law, at the conclusion of which hearings, the Informants unanimously found that there was probable cause to believe the accused guilty of professional misconduct and to warrant the institution of this proceeding, and the Informants now inform the Court and charge the accused of professional misconduct, in the particulars hereinafter set forth, to wit:

I.

That prior to the year 1944 the accused became and was associated with one Robert J. McDonald, an attorney of the Minnesota bar, in the prosecution of suits and claims against railroads for the injury or wrongful death of railroad employees, under the Federal Employers Liability Act.

That prior to 1944 the said Robert J. McDonald was notoriously soliciting employment for the prosecution of said suits and claims through agents, runners, and so-called "investigators" and had been disbarred by the Supreme Court of Minnesota by reason thereof, all of which was known to the accused; and in addition thereto, the accused knew that the employment and use of agents and runners to seek out those with claims for personal injuries in order to secure them as clients, was not only unethical and contrary to the high standards of the legal profession, but was specifically in violation of the Rules of the Supreme Court of Missouri.

That the accused, in order to circumvent said Rules, and in order to engage in, utilize and benefit from the solicitation of such claims and suits through lay runners, agents and so-called "investigators" did willfully, wrongfully and unprofessionally set up and operate a deliberate plan, scheme and subterfuge whereby the accused did utilize, employ and benefit from the services and influences of lay runners, agents, and so-called "investigators" to seek out those with claims for personal injuries or wrongful death under the Federal Employers Liability Act, and to secure such persons as his clients on a contingent fee basis, and to pay and reward such lay runners, agents and so-called "investigators" a share or percentage of the settlements made in such cases, and to make it falsely appear that the injured claimant or client was paying the lay runners, agents and so-called "investigators", as legitimate investigation expense, when in truth and in fact, said lay agents, runners and so-called "investigators" performed no legitimate investigation services.

That this scheme, plan and subterfuge followed a definite and unvarying course of conduct from 1944 to 1952, said scheme, plan and subterfuge being based upon and depending upon the absolute control and direction, possessed and exercised by the accused over the final settlement of the cases in question, and the distribution of the proceeds thereof; and that said plan, scheme and subterfuge, as a result of the accused's control over the final settlements, invariably followed a definite scheme and pattern, wherein the accused would instruct a client that certain necessary papers had to be signed to close and settle the client's case, and that pursuant to said instruction and at the direction of the accused, said cases would invariably be closed according to the following pattern, scheme and plan:

1. The client would be directed by the accused to, and would sign and endorse:

(a) Final Releases.

(b) The Railroad Company's settlement draft.

(c) A blank requisition form, provided and regularly used by the Commerce Trust Company of Kansas City, Missouri, required by that bank to be filled out as a condition precedent to the purchase of cashier's checks, said forms providing space in the body thereof for designation of the payee or payees to whom the drafts or cashier's checks requisitioned by said forms were to be paid.

(d) The personal check of the accused, payable to the client, always in an amount equal to the client's net share of the settlement as defined in the initial contingent employment contract between the client and the accused, plus an amount always and invariably equal to the amount paid to the agent, runner or so-called "investigator", which amount, with rare exception, was equal to one-third of the contingent fee originally agreed upon between the accused and the client.

2. That the accused would then:

(a) Endorse the Railroad settlement draft and deposit the same to his own personal account in the Commerce Trust Company.

(b) Fill out in his own handwriting, the body of the Commerce Trust Company requisition form, previously signed in blank by the injured claimant or client, filling in the body thereof to designate payees for separate cashier's checks, one payable to the client for his share of the settlement, and the other payable to the runner, agent or so-called "investigator" in an amount usually equal to one-half of the amount received by the accused as an attorney fee.

(c) By means of said requisition form signed as aforesaid by the client, purchase and obtain from the Commerce Trust Company two cashier's checks in accordance with the request and content of the requisition form, and would pay for the same with his own personal check endorsed by the client as aforesaid.

(d) Deliver the cashier's check payable to the claimant or client to the client.

(e) Mail the cashier's check payable to the agent, runner or so-called "investigator" direct from his office in Kansas City.

That incident to the exercise of the powers and the performance of its duties delegated to the Advisory Committee by the Supreme Court, the accused was called before the Committee on July 12, 1946, in informal hearing, at which time the accused was specifically advised that information had come to the Committee that the said Robert J. McDonald, who is now deceased, and other attorneys without the State of Missouri, were soliciting suits and claims under the Federal Employers Liability Act throughout the United States, against Railroads and farming said suits out and bringing a great many of said suits in the State of Missouri, and that it had been reported to the Committee that said lawyers were soliciting business by the use of agents, runners and so-called "investigators", and at said hearing the accused was specifically advised by the Committee that the Committee was investigating such activities and was going to stop such activities in Missouri, if at all possible.

Despite such implied warning by the Advisory Committee, in 1946, and with full knowledge of the disbarment of said Robert J. McDonald for similar conduct, the accused did wilfully and intentionally continue to engage

in, use and direct said plan, scheme and subterfuge up to and including the year 1952; and that the participation in and use of said plan, scheme and subterfuge by the accused constituted and was a violation of the Rules of the Supreme Court of Missouri, and specifically in violation of Rules 4.28, 4.34 and 4.11, of said Rules; and that by further reason thereof, the accused has failed to maintain his integrity as a lawyer and a member of the legal profession as required by Rule 4.47 of said Rules, and has violated his duty to the courts and to his clients and has thereby been guilty of misconduct whereby, for the protection of the public and those charged with the administration of justice the accused should no longer be entrusted with the duties and responsibilities belonging to the office of attorney.

II.

That from 1944 up to and including 1952, the accused has utilized, benefited from and accepted the services of lay agents, runners and so-called "investigators" for the purpose of seeking out and soliciting those with claims for personal injury and wrongful death under the Federal Employers Liability Act, in order to secure such persons as his clients, and has directed, employed and utilized lay agents and runners to bring, or influence the bringing of such cases to the office of the accused, and has paid or rewarded, directly or indirectly, such agents and runners for the same, and has divided his attorney fees with such men in violation of Missouri Supreme Court Rules 4.28 and 4.34.

III.

That from the year 1944 up to and including the year 1952 the accused has employed, utilized, benefited from

and accepted the services of the following agents and runners soliciting cases, to-wit:

J. N. Fenn, of Clovis, New Mexico;
C. C. Jennings, of Clovis, New Mexico;
W. J. Yearsley, of Kansas City, Kansas;
O. C. Brown, of Kansas City, Missouri; and
James R. Smith, of Boonville, Missouri;

all of whom are laymen, to seek out those with claims for personal injuries or wrongful death under the Federal Employers Liability Act, in order to secure them as clients for the accused, and to bring and to influence the bringing of such cases to the office of the accused, and that the accused did directly and indirectly pay and reward said laymen, contrary to the Rules of the Supreme Court, and in specific violation of Rule 4.28 thereof.

IV.

That the laymen named above were employed, directed and utilized by the accused as a part of the scheme, plan and subterfuge heretofore mentioned, and that said laymen were paid by cashier's checks in accordance with said scheme, plan and subterfuge, which payment constituted a division of fees with laymen in violation of Section 4.34 of the Rules of the Supreme Court of Missouri.

V.

That the aforenamed J. N. Fenn, from 1944 to 1952, was notoriously engaged in the solicitation of personal injury and wrongful death claims arising under the Federal Employers Liability Act in the vicinity of Clovis, New Mexico, and that the said J. N. Fenn did bring or influence the bringing of said personal injury and wrongful death cases, arising under the Federal Employers Liability

Act, to the office of the accused and the employment of the accused therein, including the following cases, to wit:

3. Austin Taylor versus Santa Fe Railroad.
4. Mrs. Roy K. Williams versus Santa Fe Railroad (for the wrongful death of her husband Roy K. Williams).
5. Eddie Lee Bell versus Santa Fe Railroad.
6. William Bouse versus Santa Fe Railroad.
7. Lee W. Dunham versus Santa Fe Railroad.
8. Oscar Brinker versus Santas Fe Railroad.
9. Marshall Simmons versus Santa Fe Railroad.
10. Otha Beck versus Santa Fe Railroad.
11. W. W. Goodner versus Santa Fe Railroad.
12. E. E. Jennings versus Santa Fe Railroad.
13. Alice Marie Francis versus Santa Fe Railroad.
14. Walter W. Hunnicutt versus Santa Fe Railroad.
15. Claud B. Thomas versus Santa Fe Railroad.
16. Ruben Mears versus Santa Fe Railroad.
17. Woodrow Donaho versus Santa Fe Railroad.
18. Raymond L. Tipton versus Santa Fe Railroad.
19. Mrs. Jesse Brown versus Santa Fe Railroad (for the wrongful death of her husband Jesse Brown).

That by means of, and as a part of, the aforementioned

1. John P. Hice versus Atchison, Topeka and Santa Fe Railway Company (Hereinafter referred to as Santa Fe Railroad).
2. Bobby Jean Spriggs versus Santa Fe Railroad (for the wrongful death of her husband John D. Spriggs).

plan, scheme and subterfuge, of the accused, the said J. N. Fenn received cashier's checks out of the proceeds of the settlement of said cases in the aggregate amount of $36,-242.41, receiving cashier's checks from each of said cases in the following amounts:

1. John P. Hice versus Santa Fe—$2,066.67
2. Bobby Jean Spriggs versus Santa Fe—$
3. Austin Taylor versus Santa Fe—$689.35
4. Mrs. Roy K. Williams versus Santa Fe—$3,964.16
5. Eddie Lee Bell versus Santa Fe—$882.63
6. William Bouse versus Santa Fe—$1,483.51
7. Lee W. Dunham versus Santa Fe—$1,642.04
8. Oscar Brinker versus Santa Fe—$1,082.28
9. Marshall Simmons versus Santa Fe—$1,794.40
10. Otha Beck versus Santa Fe—$2,075.19
11. W. W. Goodner versus Santa Fe—$4,786.28
12. E. E. Jennings versus Santa Fe—$1,083.79
13. Alice Marie Francis versus Santa Fe—$1,368.17
14. Walter W. Hunnicutt versus Santa Fe—$2,299.46
15. Claud B. Thomas versus Santa Fe—$2,135.47
16. Ruben Mears versus Santa Fe—$3,616.08
17. Woodrow Donaho versus Santa Fe—$2,311.48
18. Raymond L. Tipton versus Santa Fe—$652.62
19. Mrs. Jesse Brown versus Santa Fe—$2,308.83

That said payments of said cashier's checks to the said J. N. Fenn as listed and set out above were made and directed by the accused in conducting the scheme, plan and subterfuge heretofore mentioned and in reality constituted and were payment and reward by the accused to the said J. N. Fenn for the bringing or the influencing of the bringing of such cases to the office of the accused, and his employment therein, in violation of Rule 4.28 of the Rules of the Supreme Court of Missouri; and that said payments by said cashier's checks further constituted and were division of fees with a layman, in violation of Section 4.34 of the Rules of the Supreme Court of the State of Missouri.

VI.

That the aforenamed W. J. Yearsley from 1944 to 1952 was notoriously engaged in the solicitation of personal injury and wrongful death claims arising under the Federal Employers Liability Act, and that the said W. J. Yearsley did bring or influence the bringing of personal injury claims arising under said Federal Employers Liability Act to the office of the accused, and the employment of the accused therein, including the following cases, to wit:

1. C. C. Jennings versus Santa Fe Railroad $2,760.16
2. Joseph W. Whinery versus Kansas City Terminal Railroad Company.
3. Chester B. Bockting versus Kansas City Terminal Railroad Company
4. J. L. Harris versus Kansas City Terminal Company.

That by means of, and as a part of the aforementioned plan, scheme and subterfuge of the accused the said W. J. Yearsley received cashier's checks out of the proceeds of the settlement of said cases in the aggregate amount of $6,801.83, receiving cashier's checks from each of said cases, as follows:

1. C. C. Jennings versus Santa Fe Railroad $2,760.16
2. Joseph W. Whinery versus Kansas City Terminal Railroad Company $1,513.89
3. Chester B. Bockting versus Kansas City Terminal Railroad Company $1,777.78
4. J. L. Harris versus Kansas City Terminal Railroad Company $ 750.00

That said payments by said cashier's checks to the said W. J. Yearsley as listed and set out above were made and directed by the accused in conducting the scheme, plan and subterfuge heretofore mentioned, and in reality constituted

and were payment and reward by the accused to the said W. J. Yearsley for the influencing of the bringing of such cases to the office of the accused, and his employment therein, in violation of Rule 4.28 of the Rules of the Supreme Court of Missouri; and said payments by said cashier's checks further constituted and were division of fees with a layman, in violation of Section 4.34 of the Rules of the Supreme Court of the State of Missouri.

VII.

That the aforenamed O. C. Brown, from 1944 to 1952, was notoriously engaged in the solicitation of personal injury and wrongful death claims arising under the Federal Employers Liability Act, and that the said O. C. Brown did bring or influence the bringing of personal injury and wrongful death claims arising under the Federal Employers Liability Act to the office of the accused, and the employment of the accused therein, including the following cases, to wit:

1. Carl V. Deason versus Kansas City Terminal Railroad Company.
2. Mrs. Mark C. Jarboe versus Wabash Railroad Company (for the wrongful death of her husband Mark C. Jarboe).

That by means of, and as a part of the aforementioned plan, scheme and subterfuge of the accused, the said O. C. Brown received cashier's checks out of the proceeds of the settlement of said cases in the aggregate amount of $5,407.03, receiving cashier's check for each of said cases, as follows:

1. Carl V. Deason versus Kansas City Terminal Railroad Company $2,533.33
2. Mrs. Mark C. Jarboe versus Wabash Railroad Company $2,873.70

That said payments by said cashier's checks to the said O. C. Brown as listed and set out above were made and directed by the accused in conducting the scheme, plan and subterfuge heretofore mentioned, and in reality constituted and were payment and reward by the accused to the said O. C. Brown for the bringing or the influencing of the bringing of such cases to the office of the accused, and his employment therein, in violation of Rule 4.24 of the Rules of the Supreme Court of Missouri; and that said payments by said cashier's checks further constituted and were division of fees with a layman, in violation of Section 4.34 of the Rules of the Supreme Court of Missouri.

VIII.

That the aforenamed James R. Smith did bring and influence the bringing of personal injury claims arising under the Federal Employers Liability Act and persons having the same to the office of the accused, and the employment of the accused therein including the following cases, to wit:

1. Martin K. Carignan versus MKT Railroad Company.
2. Francis P. Tuggle versus MKT Railroad Company.

That by means of, and as a part of the aforementioned plan, scheme and subterfuge of the accused, the said James R. Smith received cashier's checks out of the proceeds of the settlement of said cases in the aggregate amount of $4,495.36, receiving cashier's checks for each of said cases, as follows:

1. Martin K. Carignan versus MKT Railroad Company . . . $2,659.44
2. Francis P. Tuggle versus MKT Railroad Company . . . $1,835.92

That said payments of said cashier's checks to the said James R. Smith as listed and set out above were made and directed by the accused in conducting the scheme, plan and subterfuge heretofore mentioned and in reality constituted and were payment and reward by the accused to the said James R. Smith for the bringing or the influencing of the bringing of such cases to the office of the accused, and his employment therein, in violation of Rule 4.28 of the Rules of the Supreme Court of Missouri; and that said payments by said cashier's checks further constituted and were a division of fees with a layman, in violation of Section 4.34 of the Rules of the Supreme Court of Missouri.

IX.

That the aforenamed C. C. Jennings, from 1944 to 1952, did bring or influence the bringing of personal injury and wrongful death claims to the office of the accused, and the employment of the accused therein, including the following cases, to wit:

1. Erce E. Jennings versus Santa Fe Railroad Company.
2. Mrs. Jesse Brown versus Santa Fe Railroad Company.

That by means of, and as a part of the aforementioned plan, scheme and subterfuge of the accused the said C. C. Jennings received cashier's checks out of the proceeds of the settlement of said cases in the aggregate amount of $3,486.12, receiving cashier's checks from each of said cases as follows:

1. Erce E. Jennings versus Santa Fe Railroad Company $1,177.29
2. Mrs. Jesse Brown versus Santa Fe Railroad Company $2,308.83

That said payments by said cashier's checks to the said C. C. Jennings as listed and set out above were made and directed by the accused in conducting the scheme, plan and subterfuge heretofore mentioned and in reality constituted and were payment by the accused to the said C. C. Jennings for the bringing or the influencing of the bringing of such cases to the office of the accused, and his employment therein, in violation of Rule 4.28 of the Supreme Court of Missouri; and that said payments by said cashier's checks further constituted and were division of fees with a layman, in violation of Section 4.34 of the Rules of the Supreme Court of Missouri.

X.

That it is a lawyer's duty at all times, and that it was the duty of the accused at all times mentioned herein, and in all cases mentioned herein, to protect and safeguard the rights and interests of his clients in the subject matter of the litigation in which he was employed, and to zealously guard and protect the money of clients collected therein; and that it was the accused's duty at all times to refrain from any action whereby for his own personal benefit he did abuse or take advantage of the confidence reposed in him by his clients, and it was further his complete responsibility imposed upon him by the high standards and ethics of the legal profession, and particularly Rule 4.31 of the Rules of the Supreme Court of Missouri to advise his clients as to any questionable transactions involved in said litigation or the settlement thereof.

That the procuring and delivering of the cashier's checks in the manner heretofore set out to the laymen named was not only in violation of the duties of the accused as defined in the preceding paragraph, but constituted questionable transactions within the scope and mean-

ing of said Rule 4.31, and that the accused did fail to truly and accurately advise his clients of the character of said transactions and the questionable nature thereof; that such transactions constituted and were an unwarranted dissipation and expenditure of large amounts of monies collected for and on behalf of said clients without the clients knowing or being advised of the true nature and amount thereof, and the reasons therefor; that the lay recipients of said cashier's checks were not legitimate investigators and that in the cases in question they performed no legitimate services in said cases to in any wise warrant or permit the large amounts paid them from the settlements of the respective cases in question; and that it was unconscionable and in violation of Rule 4.11 of the Rules of the Supreme Court of Missouri for the accused to allow and direct such payments from his clients' settlements.

That it was the duty of the accused under Rule 4.11 of the Rules of the Supreme Court to fully account for and protect the money collected for his clients in these respective cases, but that accused failed to give his clients an accurate accounting and disbursement of said monies and settlements and failed to give his clients a true and accurate account and disclosure of the amounts paid to said laymen by said cashier's checks, and the reason and justification therefor, and that the accused thereby failed to maintain his integrity as an attorney and the high standards of the legal profession, by allowing, directing and condoning the deduction and payments of large amounts from his clients' settlements in questionable transactions without advising his clients of the true character and nature thereof.

XI.

That subsequent to the employment of the accused in the case of W. W. Goodner versus Santa Fe Railroad

Company, mentioned above, the accused did pay to the said W. W. Goodner, while said claim was in the office of the accused and before the settlement thereof, the sum of $150.00 per month and other advance payments, making total payments in money to the said W. W. Goodner by the accused of $4,025.00, all for the personal use of said W. W. Goodner and not as an expense of litigation, with the understanding that the money so advanced was to be repaid to the accused out of the claimant's settlement made therein; and that the repayment of such advancements to the accused was dependent upon the settlement of the damage suit filed against the Santa Fe Railroad Company incident to the prosecution of said claim; and that said advancements in said amount of $4,025.00 in effect constituted a purchase by the accused to the extent of the advancements so made of the subject matter of such litigation, which he was then and there conducting for the said W. W. Goodner, all in violation of Rule 4.10 of the Supreme Court of Missouri, and in violation of the ethics of the legal profession pertaining to maintenance and champerty, and in further violation of Rule 4.42 of the Rules of the Supreme Court of Missouri.

WHEREFORE, Informants pray the Court to hear the charges herein contained and that after hearing the same, the Court by its order, remove the accused attorney from the practice of law in this State and for such other and further orders and judgments as to the Court may seem meet and proper.

ADVISORY COMMITTEE
STATE OF MISSOURI
By Fred B. Hulse
Chairman

Gene Thompson
Curfman Building
Maryville, Missouri

Robert L. Ross
Albany, Missouri

ATTORNEYS FOR INFORMANTS

STATE OF MISSOURI)
) SS
COUNTY OF PETTIS)

Fred B. Hulse, of lawful age, being first duly sworn, states that he is one of the Informants in the above and foregoing Information, and that he makes this affidavit for and in behalf of the Informants therein named.

Affiant further states that he has read the above and foregoing Information, well knows the contents thereof, and that the facts therein stated are true as he verily believes.

Fred B. Hulse.

Subscribed and sworn to before me this ..... day of September, 1956.

.....

Notary Public.

EXHIBIT B.

[1]* IN THE SUPREME COURT OF MISSOURI
EN BANC

APRIL SESSION, 1961

No. 45936

IN RE C. A. RANDOLPH

On October 22, 1956, the Advisory Committee of the Missouri Bar, created by Supreme Court Rule 5, filed an information in this court charging the respondent C. A. Randolph with violating Rules 4.28, 4.34, 4.11, 4.47, 4.10, and 4.42. On October 25, respondent filed his entry of appearance and on November 23, he filed an answer denying the charges.

Robert V. Niedner of St. Charles, Missouri, was on March 13, 1957, appointed Special Commissioner "to hold pre-trial conferences, subpoena witnesses and records, hear evidence; compel the attendance of witnesses and the production of books, papers and documents; to issue attachments therefor; to hear and determine all objections to testimony in the same manner and to the same extent as this Court might in the trial of the cause before the Court; and to report the evidence taken, together with your findings of facts and conclusions of law."

The Special Commissioner held numerous hearings. Many witnesses testified and countless exhibits were introduced as evidence. The Special Commissioner filed his

*Numbers in brackets refer to the typewritten page of the Opinion of the Supreme Court of Missouri.

report on July 15, 1960. The Commissioner found that respondent had accepted personal injury cases with knowledge that they had been solicited by laymen and that he had split fees with laymen who had caused injured persons to employ respondent in their cases. The Commissioner further found that respondent had followed a scheme to conceal the solicitation of cases by laymen and to conceal [2] the true basis for the remuneration of the solicitors; further, that respondent continued to follow this practice after he had been warned of the questionable nature of this practice by the Advisory Committee in 1946.

The Commissioner found that advances to clients in the way of loans or for living expenses as made by respondent were not in violation of Rules 4.10 and 4.42.

The Commissioner recommended that respondent be suspended from the practice of law for one year and that the cost of this proceeding be taxed against him.

Respondent excepted to the Commissioner's report finding him guilty of the charges of accepting cases solicited by laymen and splitting fees with them.

The Advisory Committee excepted to the ruling of the Special Commissioner finding the respondent not guilty of violating Rules 4.10 and 4.42 by making an advance of $4,025 to W. W. Goodner who was a client of respondent; further, the Committee excepted to the Commissioner's recommendation that respondent be suspended for one year. The Committee takes the position that under the evidence the respondent should be disbarred from the practice of law.

The cause was argued before the Court *en Banc* at the 1961 January Session and briefs were filed.

It has often been said, in cases of this nature, that "It is not a pleasant duty when Courts are required to sit in judgment upon a member of the bar but protection must be afforded against professional misconduct and the continuance of the exercise of the privileges of the office of attorney by one who has forfeited such privileges." *In re Conner*, 357 Mo. 270, 207 S.W.2d 492, l.c. 498 (13). It may be further said that it is a very distasteful and unpleasant task for the members of the Advisory Committee to investigate complaints made against members of the Bar and when justified, to file charges. The members of this [3] Committee are men of high integrity and discharge their duties with impartiality. Appointments to this Committee are not sought. Lawyers accept appointment on the theory that they have been requested to perform a public service. What prompted the above remarks will be stated later in this opinion.

Respondent's evidence shows that he was born in the State of Mississippi where he went through grade school. Later, he moved to the State of Kansas where he received a high school education; attending the University of Kansas, he received an A.B. Degree in 1916, and an LL.B. Degree in 1918. In June, 1918, he took the Missouri Bar examination and passed. Thereafter, and up to the present time, he has been a resident of Kansas City, Missouri.

Respondent began his legal career in a claims department of an insurance company, The Fidelity and Casualty Company of New York, with the privilege of engaging in private practice along with his work. He continued in this work for about thirteen years, gradually building up a law practice of his own. In 1931, he formed a partnership with Ed McVey and in 1933, Spurgeon Smithson and Stanley Garrity joined the firm. This firm was dissolved

in 1938 but McVey and Randolph continued as a firm until late in 1939. From 1940, respondent practiced alone. Respondent testified that all of the above-named men with whom he had been in partnership were outstanding lawyers of excellent reputation and were classed among the best. We take that to be true. Respondent also bore a fine reputation. A Justice of the U. S. Supreme Court, a U. S. District Judge, two members of the Kansas City Court of Appeals, Judges of the Circuit Court, and many reputable lawyers testified without qualification that respondent's reputation as an ethical, honest, and able lawyer was excellent. We say with candor that we wish we could stop at this point. However, duty urges us to look at the other side of the picture. We do so reluctantly because we have found the other side of the picture to be in sharp contrast with the one just described.

[4] Respondent testified that he soon learned, while working for the insurance company, the value of investigating claims and the time required for such investigations. Respondent stated that in 1921 the widow of a man named Louis M. Willgues came to him stating that she lived in Jackson County, Missouri; that her husband, employed by the Pennsylvania Railroad, had been killed in an accident at Pittsburg, Pa.; that she had been to see a number of lawyers and had been told she could not maintain her suit in Kansas City because the railroad could not be served with process in Jackson County. Respondent took her case and obtained service by attaching 500 boxcars of the Pennsylvania Railroad located in the yards at Kansas City. Respondent, in his evidence, stated that he received much publicity because of the Willgues case and soon developed a reputation by reason of that case. The case was tried before a jury. On appeal to the Supreme Court, the verdict of $20,000 was by remittitur reduced to $13,000 and

affirmed for that amount. See *Willgues* v. *Pennsylvania R. Co.*, 318 Mo. 28, 298 S.W. 817. The files of the case in this court disclose that an amended petition was filed in the Willgues case on April 20, 1922. The case was tried in April, 1924. It was decided by this court on October 10, 1927. Our files show that Jules Rosenberger tried the case for the plaintiff, examined all the plaintiff's witnesses, and cross-examined the witnesses for the defendant. Respondent, no doubt, obtained service on the railroad by attachment which we find to be the only unique fact connected with the case. In other respects, it was an ordinary run-of-the-mill damage suit under the Federal Employers' Liability Act.

It would be odd, indeed, that, as claimed by respondent, the Willgues case acted as a magnet to draw many F.E.L.A. cases to his office. Respondent stated that the Willgues case came to the attention of Robert J. McDonald, a lawyer in Minneapolis, Minnesota; that McDonald came to his office in the latter part of 1922 and made arrangements with respondent to handle cases which were to be filed in Kansas City in which [5] McDonald was interested. (Note that the Willgues case was not tried until 1924). Be that as it may, we shall concede that the service by attachment in the Willgues case attracted McDonald's attention. Respondent testified that for awhile he was paid a small retainer of about $250 a case and a per diem fee for work in connection with a case. Later, cases were referred to respondent by McDonald on an association basis. In these cases, the lawyer's fee would be divided 1/3 to respondent, 1/3 to McDonald or his firm, and 1/3 to an investigator employed by the McDonald firm. Respondent was asked if that arrangement was inconsistent with the usual practice in such cases. His answer was, "Yes, I think in ordinary litigation the person who actually

handles it usually gets at least half, if not two-thirds of the fee, so there is that very distinct difference between that type of practice and the usual referral law business." To the question, "And the explanation was that the other third was needed to investigate the cases?", respondent answered, "That is what they all said in different places."

To illustrate how cases were handled, respondent referred to a case that was settled in 1945 or late 1944 with this statement: "Well, here is one case of *Adams* v. *The Kansas City Terminal*, it was referred to me on that basis. Settlement was $12,000.00 and they had a contract with the client on a 33 1/3 percent basis, which, by the way, under the statutes of Minnesota is the most that lawyers can take the contract for with a client. After deducting the expense of the case, $199.76, their fee was $3,933.41. The third fee was, 'C.A.R. share one-third, $1,311.14,' and I remit to McDonald and DeParcq two-thirds of the fee plus any expense or loans that they may have had in the case with the client." Respondent testified that many other cases were settled on the same basis. Note that the Adams case was against the Kansas City Terminal. So it was a Jackson County case but McDonald, living in Minneapolis, was employed by Adams.

Going back now to the years following 1930, we note that [6] respondent testified that his association with McDonald was interrupted for about twelve years beginning in 1931, when he formed a partnership with McVey, until about 1942, after he had dissolved partnership with Mcvey. Respondent's explanation for this interruption was, as he stated, thus: "Well, it applies not only to McDonald but all firms that specialize in F.E.L.A. cases. They all dropped me like a hot potato, not because of anything against me personally but because they couldn't sell me to their clients inasmuch as I was representing in a firm

that was defending these cases. They were very suspicious, railroad employees generally are very suspicious of lawyers who are engaged in defending insurance companies or railroad companies or any other corporate clients so they dropped me for a period from 1931, late '31, until 1942, about 12 years."

We shall now dig a little deeper into the record where we find that respondent testified that the members of the Kansas City Bar with whom he had been associated as partners were men of the highest integrity. To this we agree. Let us, at this point, acquaint ourselves with McDonald of Minneapolis, Minnesota, with whom respondent transacted business and with whom he was associated in many F.E.L.A. cases. We state at the outset that if a medal should be offered for the most efficient, persistent brazen, and notorious "Ambulance Chaser" of all time, McDonald would be a strong contender for that medal. Why do we say this? First, because of McDonald's admissions to that effect in open court; and second, because a number of courts designated him to be such. The Supreme Court of Wisconsin in June, 1929, in *Chicago, M., St. P. & P. Ry. Co.* v. *Wolf*, 226 N.W. 297, l.c. 299, had the following to say of the firm of which McDonald was a member: "The conduct of the attorneys in this case is not only unethical and shocking to the professional conscience of any right-thinking lawyer, but violative of ordinary professional decency. The conduct of the lawyer who was described as 'flying the black flag of piracy' (*Ellis* v. *Frawley*, 165 Wis. 381, [7] 161 N.W. 364) was almost innocent compared with what was done by this firm of attorneys in securing business. The only refreshing note in the whole sordid mess is the breezy buccaneer-like confidence of Mr. McDonald, apparently born of association with an organization so invincible that he feels safe not only in violating

the laws of a sister state and the canons of professional ethics, but in flaunting the violation in the face of his accusers as if to say, 'Here it is, what are you going to do about it?'" The court in that case (l.c. 298) also approved a finding made by the trial court to the effect that the firm of which McDonald was a member maintained a "high-pressure, high-powered department, thoroughly organized, for the purpose of soliciting legal business in the State of Wisconsin, and other states, through men of experience in this line of activity employed by said firm to do the work commonly termed 'ambulance chasing.'"

In March, 1924, the U. S. District Court of Minnesota had the question of "ambulance chasing" on the part of the McDonald firm under consideration in two cases, *Chunes* v. *Duluth, W. & P. Ry. Co.*, 298 Fed. 964, and *Weinard* v. *Chicago, M., St. P. & P. Ry. Co.*, 298 Fed. 977. In each case, the clerk of the court was instructed to transmit to the State Board of Law Examiners of Minnesota a record of the case for such action as that body might deem appropriate. In the Chunes case, 298 Fed. l.c. 976 (2), we find the following statement by the court: "On the hearing of the motion to remand, in which his firm represented the plaintiff in another personal injury case heard about the same time, Mr. McDonald was charged by the opposing attorney with practicing 'ambulance chasing,' and replied, admitting the fact. In answer to a question from the court if he realized the nature of the admission he had just made, he replied: 'Of course I do. It is the truth, and why not admit it?'"

In December, 1938, the Supreme Court of Minnesota, in the case of *In re McDonald*, 282 N.W. 677, disbarred McDonald from the practice of law. The court granted McDonald leave to apply for reinstatement [8] after the ex-

piration of three years. The court reinstated McDonald on *October 8, 1940.* See *In re McDonald,* 294 N.W. 461.

The fact that McDonald and his associates in Minneapolis were ambulance chasers is not to be charged against respondent unless he knew of their activities and participated therein. Respondent testified he had no knowledge of the unethical practices:

> "Q. Now, did you ever have any knowledge or information as to how either McDonald or DeParcq or any of the rest of these lawyers who referred cases to you, how they obtained those cases or under what circumstances the cases were brought to them?
>
> "A. Well, as I have explained already, that in the first two or three years when I was just carrying water, you might say, I didn't know too much about those cases but when they made the arrangement with me for me to handle the case except for the investigation on a third of the fee basis, then they would send their investigation file or part of it at least to me and oftentimes I would see either the original letter from the client or a copy of the original letter in which he said so-and-so, 'your former client has recommended you to me and my case is so-and-so, and I wonder if you would be interested in handling it.'
>
> "Q. Did you have any reason to doubt the genuineness or bona fides of those communications you saw in the files?
>
> "A. None whatever.
>
> "Q. Did you ever have any reason to question the basis under which any of these cases that might have been referred to you subsequently were obtained by McDonald or DeParcq or any of these other lawyers?
>
> [9] "A. I saw nothing in the files and I think the files were fairly complete when they were referred that would even remotely suggest indications of that kind."

When respondent's activities were being investigated in 1946 by the Advisory Committee, he was called as a witness to explain his connection with McDonald. In the course of this examination, he testified that in December, 1924, a case was pending in the Circuit Court at Independence, Jackson County, Missouri, wherein he and the firm of McDonald and Dahl were interested. When the case came on for trial, Leslie Welch representing the defendant filed a motion to prevent McDonald or Dahl from appearing in the case. Respondent stated that Welch read from an opinion by Judge McGee of the U. S. District Court. The trial court sustained the motion to bar McDonald or Dahl from the case and respondent tried the case for plaintiff. The McGee opinion, reported in 298 Fed. 964, is the case referred to *supra* wherein Dahl and McDonald were accused of being ambulance chasers and wherein McDonald admitted the charge. That opinion is dated March, 1924, only a few months before the incident at Independence took place. So, in 1924, respondent had actual notice that his associates at Minneapolis were in the business of soliciting personal injury cases, especially F.E.L.A. cases. With respondent in possession of such knowledge and considering all of the notoriety concerning McDonald's activities, including his disbarment in Minnesota, we must conclude that respondent was well aware of the situation. Yet, in spite of the knowledge obtained in 1924, respondent, during the years from 1924 to 1930, actively took part in that business and agreed to split the attorney's fee 1/3 to respondent, 1/3 to the Minneapolis attorneys, and 1/3 to the so-called investigators who were in fact solicitors. Furthermore, after an intermission of about twelve years, during which time respondent was a partner of McVey, respondent resumed his association with McDonald. That was after McDonald was reinstated as a member of the Bar of Minne-

sota. John F. Dahl [10] was suspended for six months from the practice of law in the State of California in July, 1931, on a charge of soliciting cases and dividing fees with solicitors. *Dahl* v. *State Bar of California*, 213 Cal. 160, 1 P.2d 977.

Respondent testified that when he formed a partnership with McVey, people interested in personal injury cases "dropped me like a hot potato" and remained away for twelve years. This, according to respondent, was because the firm was representing insurance companies and acting as defense lawyers. The record refutes this contention by respondent's own evidence. He testified that while working for an insurance company from 1920 to 1930, he handled many personal injury cases. Note further that after he resumed his association with McDonald and during the years following 1940, respondent says that three fourths of his business was defense work in representing large corporations and insurance companies. Respondent named eight different corporations and insurance companies that he had represented during that time. In spite of that, instead of dropping him like a hot potato, those with F.E.L.A. cases came to him like flies to molasses. So, whatever the reason that F.E.L.A. cases did not come to respondent between the years 1930 and 1940, it was not because respondent represented insurance companies.

The charges against respondent concern cases that were handled after 1940. The events occurring prior to that time are material only in so far as they demonstrate that respondent well knew that the firm of which McDonald was a member had for many years solicited F.E.L.A. cases and had split fees with lay solicitors. After 1940, when respondent resumed his association with McDonald, the fees in the cases which respondent handled in Kansas City were processed in the same manner as others had been between

the years 1920 and 1930, that is, 1/3 to respondent, 1/3 to McDonald, and 1/3 to a so-called investigator. The only difference was that McDonald changed his manner of dealing with the solicitors. The Supreme Court of Minnesota, in the disbarment case, [11] found (l.c. 683 (11) of 282 N.W.) that McDonald "in spite of the warnings and advice of the state board of law examiners, he has persisted in such practice, merely severing his relations with certain attorneys officing with him and discharging his brother Donald, the chief solicitor, at the request of the board." The record shows that in 1946 McDonald had thirteen cases pending in Chicago, Illinois, against railroads. In such cases, five plaintiffs lived in Kansas, five in New Mexico, one in Louisiana, one in Iowa, and one in California. A suit was filed in Chicago charging that McDonald had acquired the cases through systematic solicitation of F.E.L.A. cases.

In June, 1946, the Advisory Committee notified respondent to appear before the Committee on July 11, 1946. In response to that notice, respondent testified before the Committee with reference to his dealings with McDonald and DeParcq who were associates at that time. It was at this hearing that respondent testified that, in 1924, the court at Independence had barred McDonald and Dahl from appearing in a case because they had been found guilty of soliciting cases. In that hearing, that is, July, 1946, it was also brought to light that DeParcq, who was associated with McDonald after 1940, had been barred by a federal judge from appearing in a case until a showing was made that the fee was not to be split with the Brotherhood, a railroad association.

The cases in which respondent participated with McDonald became less in number as time passed. During the years after 1940, and before McDonald died (July 5, 1947), respondent became acquainted with a number of so-called

investigators who had dealings with McDonald. Among these were C. C. (Cliff) Jennings, Norman Fenn, W. J. Yearsley, and O. C. Brown. These four men had dealings with Randolph and received fees on a percentage basis in cases wherein Randolph claimed the men performed services in investigating the cases. The manner in which the cases were brought to respondent's office followed the same pattern. We do not deem it necessary to deal specifically with all of the cases [12] but we shall review a number of cases in which Jennings, Brown, and Fenn participated.

After July, 1946, at which time respondent testified before the Advisory Committee, the Committee made further investigations concerning respondent's activities in procuring F.E.L.A. cases. Charges were filed in October, 1956. Thereafter, the case was heard by the Special Commissioner and his report was filed in this court. The Advisory Committee, in the brief filed in this court, contends that the evidence supports the charges. Respondent insists that the evidence is insufficient to support any of the charges. Note what is said in respondent's brief: "In addition to respondent's testimony that he never employed or paid a runner to solicit cases for him, all of his former clients who testified (with a single exception, Hice), testified that neither Randolph, nor any one in his behalf, solicited his case." At another place in the brief, the above statement was repeated in much the same language and the clients' names who, it is claimed, testified for respondent were named. The following is the statement; however, we have omitted the names of all but three of the witnesses: "The only witness who testified that the investigator solicited the client to employ Randolph was Hice. But * * * Carignan; * * * Tuggle; * * * Deason; * * * being all the other former clients, testified to the contrary." We shall

examine the record and determine if the above statements in respondent's brief are true. Before taking up the Carignan, Tuggle, and Deason cases, we shall review the cases of *Donnelly, Admr., Brown et al.* v. *A., T. & S. F. Ry. Co.*, and *William R. Bouse* v. *A., T. & S.F. Ry. Co.* The Brown case was a suit by Mrs. Pauline V. Brown to recover damages for the death of her husband. In November, 1944, an explosion following a derailment of a train at Tolar, New Mexico, caused the husband's death. A proposed settlement of $6,500 in a court in New Mexico was not approved by the court. Thereafter, a cousin of Mrs. Brown, who happened to be C. C. (Cliff) Jennings, referred Mrs. Brown to respondent Randolph [13] at Kansas City, Missouri. In fact, she rode to Kansas City with Jennings. Respondent was employed and thereafter the case was settled for $17,500. The check from the railroad was made payable to Mrs. Brown and Randolph. Respondent had a contract with Mrs. Brown for a 40% fee but by an interlineation in the contract, it was provided that if the case were settled, the fee would be only 26 2/3%. A pencil notation at the bottom of the contract stated, "Fee of 26 2/3% only if she hires case investigated at her cost. Says may have her cousin do this." Of the $17,500, Randolph retained $4,617.67 as a fee plus $183.75 for expenses. Randolph gave Mrs. Brown a check for $12,698.58, then took her to the Commerce Trust Company and had her cash her check. Two cashier's checks were issued against that sum, one to Pauline V. Brown for $10,389.75, and one to C. C. Jennings for $2,308.83 which was 13 1/3% of the amount of the net settlement. Randolph's share was 26 2/3%, making a total of 40% in fees.

Let us look at the *Bouse* case. Bouse was injured while at work for the Santa Fe Railroad in New Mexico. Respondent was his attorney. The case was settled for $13,500. An amount of $123.68 was deducted for expenses:

the net was $13,376.32. Attorney fee to respondent of 26-2/3% was $3,567.02. $300 was deducted for a loan. The balance to Bouse was $9,509.30. Bouse was taken to the Commerce Trust Company where he cashed his check. Two cashier's checks were then purchased, one to Bouse for $8,025.79, and one payable to J. N. Fenn, the alleged investigator, for $1,483.51.

Respondent's contention as to these and other cases is that the client employed the investigator and paid for the services rendered which usually was one half as much as the attorney's fee. The record does not sustain respondent's contention. Bouse's deposition was taken on April 28, 1955, at Albuquerque, New Mexico, concerning a contract with Fenn. Bouse stated therein:

"Q. Did you employ Mr. Fenn?

[14] "A. No, sir.

"Q. In any capacity?

"A. No, sir.

"Q. For what reason did Mr. Fenn receive approximately eighteen hundred dollars of your settlement?

"A. He afterwards came to me and asked me if I wanted him to investigate a case for me to get depositions, he said, which I would need. I told him if he could do this work that it would be all right. That if he wanted to get them it would be fine, but I didn't know at the time that I was going to have to pay him. You know I thought he would do this for free gratis. I later found out I had to pay him for this work."

Bouse stated in his deposition that L. A. Stevenson recommended Randolph as an attorney. At another place in his deposition, Bouse stated that a man named Bryant referred him to Randolph. Bouse was asked how he met Fenn. Note what he said:

"Q. Mr. Fenn contacted you and stated to you that he was an investigator, is that correct?

"A. No, he was sent to me. This boy told me he said that he could do this kind of work and—

"Q. Who sent him to you?

"A. We met one day down at the drug store is the way it happened. He asked me how I was getting along, I told him I wasn't doing any good. He asked me if I had anybody doing the investigation for me. This L. A. Stevenson told me the boy would be very good, he recommended. He did them for him and I thought he did the work for free.

[15] "Q. Do you know of anyone that Mr. Fenn contacted in regard to your case, Mr. Bouse?

"A. No, I don't know of anyone."

Respondent contends that he advised his clients to hire investigators in New Mexico because if he made the trip to New Mexico, it would take too much time and require greater expense. The record in the Bouse case shows that Randolph was present in Clovis, New Mexico, on December 17 and 18, 1947, and took depositions in the case. On September 14, 1948, a deposition was taken in Kansas City, Missouri. The record further shows that Fenn did very little work for the fee he received. In fact, Bouse could have obtained statements of witnesses for Randolph as well as Fenn. Mr. Bouse stated in his deposition he knew of no one Fenn had contacted in his behalf. Further on in the deposition, Bouse gave the following evidence:

"Q. What did Mr. Fenn state to you he had done to earn eighteen hundred dollars?

"A. I never contacted Mr. Fenn whatsoever.

"Q. Did it seem normal to you to take eighteen hundred dollars of your money and give it to Norman Fenn?

"A. Well, it seems to me like it is a little high.

"Q. It is a little high for, even if he had done something. isn't it Mr. Bouse?

"A. It seems to me like it might be a little high price there. Here is the thing about it, in a deal like that I don't guess I was in any position to argue the question."

Bouse further stated that Randolph took additional statements from witnesses Bouse had suggested to him; that he had given these same names to Fenn. When the settlement was made, respondent went with Bouse to the Commerce Trust Company and had the bank issue a draft made [16] payable to Fenn which was mailed to Fenn.

Francis P. Tuggle, an employee of the M.K.T. Railroad Company, was injured in June, 1946. At that time, he lived in New Franklin, Missouri, where he was injured. He testified that he had never heard of Randolph until James R. Smith came to see him at his home. Tuggle stated that the following occurred during this visit:

"A. Well, after he was in the house awhile he wanted to know how I was getting along, and I told him there had been a man or two from the Brotherhood of Railroad Trainmen from St. Louis, and they had been there from Chicago, and there had been men from all over the country after I got back from the hospital, but I told him that I wasn't interested in suing the railroad company, that what I wanted was not to lose my seniority and to go back to work.

"Q. Was he talking to you about suing the railroad company?

"A. Well, he mentioned that if I had any difficulties that he might be in a position to help me out.

"Q. How could he help you out?

"A. By getting Randolph.

"Q. That, I think you told me, was the first you ever knew of Randolph?

"A. Yes, sir.

"Q. Did he subsequently take you to Kansas City?

"A. When I made up my mind to come, yes, he brought me to Kansas City after I wrote the letter.

"Q. On that, now, did he tell you you would have to write a letter to Randolph?

"A. Yes.

"Q. Just tell the Committee in your own words what [17] he said about that.

"A. He said I would have to write to Randolph to get an appointment when would be a good time that he could see me and discuss the case with me.

"Q. Is that the reason you wrote the letter, because Smith told you you would have to?

"A. That is right. I asked him then why I couldn't just go on up. He said I would have to write a letter, so I wrote it.

"Q. Then Randolph did write and make an appointment?

"A. That is right.

"Q. Now, did Smith go with you to Kansas City?

"A. That is right."

Further evidence given by Tuggle was to this effect:

"Q. Did you hire James R. Smith to do anything for you on that day?

"A. Absolutely not, not that day or any other day."

When Tuggle was asked if Randolph recommended Smith to do some investigating for him, Tuggle replied,

"When he stated the contract that he was to get 50 percent of my final settlement from the railroad company if he done the investigation, but he said he would make it a little lighter on me if we done our own investigating, like if we wanted to find this thing or the other down at New Franklin, if I was able to go—well, he said, 'Mr. Smith

was your neighbor, he could possibly do that if you wasn't able to get out of the house.' "

Then followed this testimony:

"Q. But he said he would investigate it?
"A. That is right.
"Q. You didn't contract with Smith?
"A. No.
"Q. You just signed a 50 percent contract?
[18] "A. That is correct."

The case was settled for $15,000. The railroad's check in settlement was for $14,350, showing a refund from Tuggle to the Retirement Board in the sum of $650. Of the amount of the settlement check, Tuggle received a check on the Commerce Trust Company signed by Randolph for $8,532.61. This check was cashed at the Commerce Trust Company; then two cashier's checks were issued, one to Tuggle for $6,696.69, and one to James R. Smith for $1,835.92. The balance went to Randolph for expenses and attorney's fee.

The contract for employment in this case provided for a fee of 50%. An interlineation in ink read "provided if settled before trial fee to be 37½%." Then a pencil notation appeared at the bottom of the contract which read "37½% my fee if he has case investigated by special investigator at his expense otherwise 50%." The contract in question is a typical example of most of the contracts in the cases investigated by the Advisory Committee. The interlineation in the contract shows that a different ink was used from that used in the body of the contract. Furthermore, in practically all of those contracts the provision as to the investigator was made in pencil at the bottom of the paper and is barely legible.

The evidence in this (the Tuggle) case shows beyond a doubt that Smith was responsible for Randolph's employment; further, that the fee paid to Smith was his reward for bringing the case to respondent. Smith did very little, if any, work on the case. Respondent testified that Smith made the investigation for Tuggle and that Tuggle paid for the investigation. When asked about Tuggle's evidence, respondent stated that Tuggle was "a little impetuous." Respondent further testified that Tuggle had told him after the Advisory Committee began the present investigation that "You don't have anything to worry about from the Bar Committee as far as my case was concerned."

Martin Carignan, living at Boonville, Missouri, was an [19] employee of the M.K.T. Railroad Company. He was injured on June 27, 1946, at Fort Scott, Kansas. Respondent testified he was employed in this case by Carignan; that Carignan wrote a letter to respondent in August, 1947, to the effect that on the recommendation of J. R. Smith he desired to employ respondent. The case was settled for $27,000. Deductions for loans, expenses and a sum of $520 advanced by the Retirement Board were made. Respondent received a fee of 30% amounting to $7,978.30 based on the net settlement of $26,594.36 after Randolph's expenses were deducted. Carignan's check was for $17,659.44 which was cashed and two cashier's checks issued: one to J. R. Smith from the Commerce Trust Company for $2,659.44 which was 10% of the net settlement; the other to Carignan for $15,000. The contract in this case was similar to the Tuggle contract, including the ink and pencil notations. However, the former was a 50% contract while the Carignan contract provided for a 40% attorney's fee. In the Carignan contract, it was provided that in case of a settlement before trial, the attorney's fee

would be only 30%. We quote a portion of Carignan's testimony to demonstrate how he happened to employ respondent:

"Q. Tell the Committee just who this James R. Smith is, Martin.

"A. Well, of course to tell about that I would have to go back to Pat Tuggle. Tuggle was a member of the lodge there.

"Q. That was your Brotherhood?

"A. Of the Brotherhood, and as Secretary and Treasurer of the lodge, of course I was in contact with Pat Tuggle, and Pat had an injury sometime after I did, and I did not hire any lawyer, attorney, I attempted to talk to the railroad company and sort of reach an understanding or agreement with them, and Pat first came over to my home quite a bit and [20] told me that he had contacted a fellow by the name of Smith. I didn't know the man. And that he had through Smith hired a lawyer here in Kansas City, Mr. Randolph.

"The Chairman: C. A. Randolph?

"The Witness: C. A. Randolph. He suggested to me that I do the same thing, that we would both be together in the cases, in other words. Of course, I didn't know Smith, like I say. Mr. Smith came to the house one afternoon and I was in the back yard, and introduced himself and told me who he was, told me about Pat and told me about his injury. He had been injured at some previous time on the railroad.

* * *

"Mr. Hemker: But he came to your yard?

"The Witness: Yes. So he told me of his experiences with Mr. Randolph, and he told me that the only way I could contact Mr. Randolph was to write him, which I did. I wrote Mr. Randolph a letter."

Later, Smith took Carignan to Kansas City where Carignan saw Randolph. Carignan rode back to Boonville

with Smith. Carignan testified that the contract he signed with Randolph had no pencil notations on it at the time of signing. As to employing Smith to investigate the case, Carignan testified:

"Q. Did he tell you that you would have to contract with Smith to investigate your case?

"A. No, sir, Mr. Randolph didn't mention Mr. Smith to me, or anything else in my case.

"Q. Did he tell you that Smith was an investigator that you could hire?

"A. No, sir.

[21] "Q. Now, Mr. Carignan, to keep this in order, did you ever at any time hire James R. Smith to do any work in your case of any kind?

"A. No, sir.

"Q. Did you ever tell him that you would pay him anything?

"A. No, sir.

"Q. At any time?

"A. At any time, I did not.

"Q. Did you ever pay him anything that you ever knew about?

"A. No, sir."

Carignan stated that Smith, to his knowledge, did not aid in the investigation of the case. With reference to the payment to Smith, Carignan testified:

"Q. That is a photostatic copy of a Commerce Trust cashier's check No. 799353 payable to James R. Smith in an amount of $2,659.44, dated November 9, 1948, the date of your settlement.

"A. That is right.

"Q. Did you ever know that amount was being paid to James R. Smith, Martin?

"A. Not until you showed it to me.

"Q. Did you mail anything to James R. Smith the date of your settlement?

"A. No, sir.

"Q. From Kansas City?

"A. No, sir."

The record shows that one Carl V. Deason while working for the Kansas City Terminal was injured on February 9, 1946. Deason testified that on February 19, 1946, he signed a contract whereby he employed Randolph as his attorney to handle the case. Deason testified that he employed [22] Randolph through a friend; that he called Randolph and later went to his office and signed a contract; that O. C. Brown came to him after Randolph had been employed stating that he represented a Minneapolis lawyer; that Brown was at his place about thirty minutes and he, Deason, told him he had employed Randolph. On cross-examination, he was asked, "I am not asking you for reasons. I am asking you for facts. Now, did anybody come to you prior to the day that you went up to Mr. Randolph's office and say to go up and get Mr. Randolph or go up and hire him, he was a good lawyer, or anything like that?" Deason replied, "Yes, he did. He recommended, Brown recommended Mr. Randolph but understand I had already cut him off when he said he represented the Minneapolis lawyees because I told him I only want one lawyer and I want a good one and I have already talked to him." Deason stated that he never again saw Brown; that Brown did not do anything for him in the case; that Deason and his son and Randolph did all the investigating that was done in the case. The contract of employment provided a 40% fee, and by interlineation, in a different color of ink from that of the body of the contract, it was stated that "provided if case settled before trial fee to be 4/15 of settlement" and in pencil at the bottom of the contract appeared the notation

"This on basis he hires case investigated at his expense." Deason testified that the interlineation and the pencil notation were not on the contract when it was signed; that his contract with Randolph was on a 60-40 basis. He further testified that he was well satisfied with Randolph's work and that he, Deason, received his 60% of the amount of the settlement which, after deductions for expenses, was $11,-249.20. However, the record shows that O. C. Brown received $2,533.33 in this case; Randolph's fee was $5,066.67. Note that Brown's fee was one half the amount of Randolph's fee.

Deason had signed an affidavit which had been prepared by Randolph in which it was stated that he had agreed with Randolph [23] to employ an investigator and that Brown did investigate the case; that Brown and Deason had worked together on the case. The affidavit further recited that Deason paid for two drafts "with the check Mr. Randolph gave me." Deason testified that after the investigation was commenced Randolph came to see him and stated that the "Bar Association was practically persecuting him on account of getting so many of these cases, and I really felt sorry for him because he was in bad shape"; that Randolph told him he wanted to make an investigator out of Brown "and I asked him who Brown was, I didn't even remember him"; that his (Deason's) eyes were bad when he signed the affidavit which Randolph prepared and which was brought to him to sign by Yearsley. Deason further testified that afterward, when he saw a copy of the affidavit, he called Randolph and told him there were statements in the affidavit that were not true. He stated that all of the matters with reference to Brown's being an investigator and being paid therefor, as stated in the affidavit, were not the truth; that he never in his life was in the Commerce Trust Company's place of business and knew

nothing of a cashier's check to Brown until the present investigation was under way. With reference to knowing what was in the affidavit, Deason, on cross-examination, gave the following testimony:

"Q. Did you know anything that was in the statement?

"A. No, I couldn't read them.

"Q. You don't know a thing about what is in the statement?

"A. At that time I didn't.

"Q. Do you know now?

"A. Why, yes, as soon as I got a copy of them I called him up and told him he had better change them.

"Q. As soon as you got a copy of them?

[24] "A. Yes.

"Q. When was that?

"A. About three or four months afterwards.

"Q. And you called Randolph up and told him to change them?

"A. Yes, I sure did."

This witness was friendly to Randolph but his version of what occurred with reference to Brown's activities was quite different from Randolph's version. According to Deason, he saw Brown only once and that was when Brown tried to solicit the case for a Minneapolis lawyer; that when told that Deason had employed Randolph, Brown gave Randolph a boost. According to Deason, Brown did nothing except to try to solicit the case and for that he received a part of the fee of 40% mentioned in the contract.

We could go on and on discussing other cases. However, we deem that to be unnecessary. A number of cases, among which was the *Bouse* case discussed *supra*, originated in New Mexico where Fenn seems to have been very ac-

tive. Fenn had been a part of McDonald's organization and was well schooled in the art of getting cases. Instead of reviewing other cases in which Fenn was paid, we shall quote a portion of the Commissioner's report which shows how minutely the Commissioner examined the record and the thorough consideration he gave to the case. The findings of the Commissioner are fully supported by the evidence. We now quote from the report: "To support the Commissioner's view that Fenn was instrumental in having persons in New Mexico employ Respondent, the employment letters received by Respondent from these prospective clients have a great deal in common. Exs. 3-13 and 7-13 received in August, 1945, from Mrs. Francis and Lee Dunham, both begin, 'You have been recommended to me (By Some Friend) (Ex. 13-13) as a good personal injury lawyer.' ('Pursnal Ingery,' Ex. 13-13). There is a slight variation in Ex. 11-19, 'You have been recommended to me by several men who had good results [25] from your services,' and in Ex. 5-11, from Bell, *i. e.*: 'You have been recommended to me by Mr. R. O. Mears as a good lawyer.' In Ex. 17-14, from Donoho, Ex. 3-11a from Taylor and Ex. 10-25 from Beck, the letters begin, 'Since I have heard of you as an attorney handling personal injury cases,' and, 'I have heard of you as a great personal injury attorney,' and, 'Having heard of you through some of the many cases you so ably represented down in this part of the Country.' While anyone of these individuals might have written such a letter to Respondent, it seems apparent, in placing them side by side, that the similarities could hardly be coincidental. In view of the evidence that Fenn was in contact with these people in many cases, the Commissioner believes that Fenn inspired these letters. In fact, it seems to be admitted that he wrote Taylor's letter. Respondent points out that there is no significance to Fenn's having

written Taylor of employment to Respondent, that Taylor could have gotten anyone to do that. But he didn't. Fenn did it.

"Respondent contends he did not suspect that some of the employment letters were written by Fenn.

"The Commissioner does not believe that, in view of Respondent having had more occasion to be familiar with Fenn's handwriting than with that of any of his clients."

In many other cases, the letters to respondent show that the prospective clients were prompted or advised to write Randolph. Respondent testified that generally he would agree with the client for a certain fee, then he would discuss the question of investigating the case, and that the client could if he wished pay for the investigation. Note, however, that the respondent's fee actually collected plus the investigator's fee, as a rule, amounted to the highest per cent mentioned in the contract. The client had nothing to do with setting the pay for an investigator. In many instances, the client did not know that an investigator was to be paid until the case was settled and even then some clients did not discover such fact. The Commissioner found [26] that the fees paid were all out of proportion to the amount of work performed by these so-called investigators. The unvarnished truth is that these investigators, as the Commissioner found, were paid for soliciting cases. Very few clients, if any, ever received the benefit of the clause in the contract, "If case is settled before trial."

The evidence justifies a finding that Randolph's manner of operation was in substance as follows: After a person was injured, the so-called investigator would make contact with the injured person who would then be told of respondent's ability to deal with F.E.L.A. cases; that in order to employ respondent, the injured person was told

he must write a letter to respondent about the case and of the desire to employ respondent. In some instances, the so-called investigator would not even be in the picture until after a contract of employment was signed with respondent. Often, the investigator, either at the suggestion of respondent or sometimes through the investigator's own approach, would contact the injured person and would do some investigation work on the case. In very few cases, did the injured person know at the time the contract of employment was signed that the alleged investigator's fee and the lawyer's fee together would equal the full amount of the highest stipulated per cent mentioned in the contract. For example, a contract which provided for an attorney's fee of 40% with an interlineation that the fee would be 26 2/3% "if case is settled before trial" would be settled on the basis of 26 2/3% to respondent and 13 1/3% to the so-called investigator or a total of 40%. Respondent would take 26 2/3% and give the client a check for the balance. Then, respondent would take the client to the Commerce Trust Company, have him cash respondent's check to the client, and with that sum purchase two cashier's checks, one payable to the client and the other to the investigator for 13 1/3% of the amount of the settlement. We note that respondent was very careful to see that this check or draft would be sent to the investigator. In some cases, the check to the investigator was mailed from respondent's [27] office. The pencil notation on these contracts concerning the client's employing his own investigator is inconsistent with the provision of the interlineation that a lesser fee would be charged "if case is settled before trial." It is our opinion that the interlineation and the pencil notation were a part of the scheme to cover up the real situation. So, too, were the transactions at the bank. Furthermore, we call attention to the fact that in practically all of

these cases, the client was required to write a letter to Randolph. That same practice was followed by McDonald. (See Randolph's evidence, *supra.*) The activities of respondent amounted to nothing more or less than plain "ambulance chasing" through so-called investigators who in fact were solicitors.

The charge that respondent divided his fees with lay solicitors was established by the evidence beyond a doubt; further, that respondent followed a scheme to conceal the solicitation of cases was also well established. These practices continued up to the time the charges were filed.

The conduct of respondent and his attitude toward the members of the Advisory Committee and its investigation reflect guilt. The record shows that Mrs. Pauline V. Brown, whose case we discussed, *supra,* was later married to M. B. Mayhon. After this investigation was begun and before the charges were filed, Randolph located Mrs. Mayhon in Black, Texas. Randolph wrote a letter in longhand to her, dated March 27, 1954, which began as follows: "Your name and address have been given me as being the former Mrs. Pauline V. Brown of Tolar, N. M." Further on in this letter, respondent wrote the following:

"Now the railroad and the Clovis lawyers are working with the Grievance Committee of the Missouri Bar trying to take away my license to practice law. They are trying to prove that I hired a 'runner' or 'runners' to get these cases for me and divided my fees with persons who are not lawyers which is a violation of the lawyer's code of ethics and prohibited by law. Your case is only one of several cases I handled [28] from New Mexico, mostly near Clovis, and they have obtained photographs of the settlement checks the co. gave in settlement of these cases and are going around to see all my former clients and pumping

them for information, getting affidavits and statements from them, and getting them to go to somebody's office and having a stenographer or tape recorder out of sight taking down or recording the conversation. Has any one been around to see you about your case during the last few weeks? If so, who, when, and who did he say he was? What did he ask you and what did you tell him? Was it at your home or in some office? Did you sign anything and if so what was in the statement? Was it before a notary? Was the conversation taken down or recorded on a machine?

"If no one has talked to you, be on your guard. Sometimes they have some neighbor or friend engage you in a conversation about your case to see if they can get you to say something they can use. If anybody sees or calls you refuse to go any place to be interviewed where they may secretly take down or otherwise record the conversation. Make them come to your house. Just as soon as they start asking you questions about your case or your lawyer, whether over the phone or face to face, just cut them off short and say I was recommended to you by a client, you wrote me and later went to Kansas City and hired me, that I handled your case to your entire satisfaction and you regard this matter as entirely personal and of no concern to anyone else, and refuse to discuss the matter any further. They may try to arrange the conference by having some local lawyer, doctor, banker or friend call you. If you have used the services of any lawyer in your locality they may have him call or see you to get you to his office. They will stop at nothing. If they do, tell him the same thing."

There are four more pages of this letter wherein Mrs. Mayhon was informed the exact manner in which respondent claims the case was handled.

The following is a letter written on July 31, 1955:
[29] "Dear Mrs. Mayhon:

"Since writing you on July 3, 1955, it now looks like I will not be able to get around to see you as I had hoped I could and my not be able to have anybody else see you personally. When you wrote me in April, 1954, answering my letter and said, 'I will be glad to help you in any way I can,' I knew you believed in me and really appreciated the fact that I got you a settlement almost three times as large as the claim agent offered you and the Clovis lawyers seemed to think was about the best you could do. As you probably surmise, the Clovis lawyers also are sore at me because I have been showing them up in these cases and getting New Mexico people so much better settlements than they are able to get the people out there have learned it is very much to their advantage to pass those lawyers up for somebody who can and will make the railroads pay what their cases are worth, just as you found out in your case. So the New Mexico lawyers are joining hands with the Santa Fe and other railroads and with the Committee of the Missouri Bar in trying to take away my license to practice law, which is my means of livelihood for myself and family. Members of this Committee as well as both lawyers they have appointed to handle the case against me also represent railroads, although they deny this when they go around to see my clients. They and the claim agents are resorting to every imaginable underhanded trick and device in their efforts to mislead my clients and get them mad at me and the investigator in their case. As fast as I catch up with one set of lies they are telling them I find they have started a lot of new ones. Now I hear they are telling them I have made millions of dollars by cheating my clients and that I got rich off of them, and that I beat them out of a lot of money and they will get it back for

them if they will only do and say as they ask, and tell them they might as well as all my other clients say I beat them and that their cases were not handled in the manner I say they were handled.

"So you will see that they are out to get me, whether by [30] fair or foul means they don't care. You can readily see from all this that I have to turn to my clients whom I feel I have served well, who have in their power to help or hurt me, for a little honest and conscientious assistance. As I told you in my last letter, contrary to the story these people after me are putting out, I am getting a heart-warming response from my clients in their efforts to help me any way they can. They are glad to give me statements in their cases.

"I have gone through the file in your case, also canceled checks and the records of my bank, and I have drawn up a statement covering the highlights of the way your case was handled and investigated, and covering the matters discussed in our correspondence during the past year or more. It is in accordance with the facts and the records in my office and at the bank. To refresh your recollection on the things covered in the statement, after more than 10 years, I have had a number of papers photographed and enclose them. These include one letter from you and the last page of another letter showing that Cliff was helping to work your case up and advising you, my check to you with your endorsement, showing also my O.K. when I identified you at the bank in buying the two drafts with the check I gave you, also the two drafts issued by the bank, one to you for your 60% and the other to Cliff for his 13 1/3%, the indorsements on the drafts. You will remember you signed an order to the bank fro these two drafts which is part of the bank's records. However I have made a typewritten copy which I also enclose which

will refresh your memory on this. So you will know you were not beat out of anything, as these people are telling my clients, I have before me the settlement statement I showed you at the time. It shows my expense was $183.75, which deducted from $17,500, left a net settlement of $17,316.25. my fee of 26 2/3% was $4,617.67, which deducted from the net settlement left $12,698.58, the amount of my check to you.

"Will you please go before a notary and sign the original statement enclosed on the line marked with X in pencil and mail it to me [31] in the enclosed stamped, addressed envelope, keeping the copy of the statement enclosed so you can refresh your memory at any time as to the facts and what you said? I don't know how far you will have to go to get to a notary or exactly what the notary fee will be, but I believe the bill enclosed will cover all this. If not, let me know. I noticed Friona was in Parmer County and put that county on the statement. I didn't know what county Black was in.

"Thanking you for your help and consideration in this matter, I am

"Yours very truly,

(typed) "C. A. Randolph, 712 Commerce Bldg.,
"Kansas City 6, Mo."

"P.S. You can keep these photostats of checks etc. too." (The body and signature of the letter were written on a typewriter but the postscript was written in longhand.)

A letter dated December 2, 1954, written in longhand by "Jap" Fenn from Portales, New Mexico, to respondent with reference to a statement made by respondent's former client Bouse contained the following information: "I called Bouse. He said that an attorney there, was the head of

the N. Mexico Bar. Wanted to fly him to K.C. to say that you solicited his Case. He said he told him to go to hell. He said he told him he had nothing to say." The balance of the letter was in the same tone. It was not shown that respondent advised Bouse to tell anyone asking about cases "to go to hell." However, did not respondent advise Mrs. Mayhon to tell anyone who made inquiry about her case about the same thing except in slightly more polite language?

Respondent's charge that the members of this Committee had entered into a conspiracy with the members of the Bar of New Mexico and railroad companies to have respondent's license revoked was not true and was uncalled for. We are of the opinion that the sole purpose of statements to that effect was to generate animosity in the minds of respondent's [32] clients toward the investigation. It was this charge of respondent that prompted the remarks earlier in the opinion to the effect that the duties of the Committee are indeed unpleasant. It is respondent's position that he had grounds for making such charges because of what his former clients had told him. An examination of the letters written by respondent to Mrs. Mayhon, from which we quoted *supra*, shows that respondent was telling his former clients of an alleged conspiracy and not the clients telling respondent. Respondent and his so-called investigators were very active in getting statements from clients as to how they came to employ respondent. The statements often were prepared by respondent, making them consistent with the scheme to conceal the true basis on which the alleged investigators were paid. As to this, is it not reasonable to assume that the client would have sufficient recollection of how he came to employ respondent and whether the client employed an investigator? The client had only one such event as a serious injury and

settlement of his case to remember while respondent dealt with numerous such cases. Furthermore, if there was nothing wrong with the manner in which the cases were obtained, what was respondent afraid of? Why all of the activity in preparing statements for the clients and reminding them just how their cases were handled?

Respondent had a perfect right to prepare his defense and to get statements from his former clients. However, respondent was not justified in telling his clients that the members of the Advisory Committee and the attorneys for that Committee were all employed by railroads; that they had entered into a conspiracy to revoke his license; that they lied, stooped to underhanded tricks, and employed foul means in getting evidence against respondent. The conduct of respondent in this regard, stating it mildly, was reprehensible.

It is true that railroads were complaining of Randolph's activities. It is also true that claim agents of the railroads, especially one named Hinkle, were active in the investigation of respondent. [33] Respondent testified that Hinkle had been after him for some time; that Hinkle had an injured person sign a settlement for a very small sum; that respondent took the injured person's case, had the settlement set aside, and obtained a substantial sum for his client. Respondent stated that that case embittered Hinkle against respondent. In such cases, courts set aside the settlements obtained by claim agents. Certainly, such practices in obtaining settlements should not be condoned. However, granting all that to be true, respondent was not justified in accusing the members of the Advisory Committee or the attorneys representing the Committee of a conspiracy and gross misconduct.

In the brief filed in this court, it is stated, and in the oral argument it was asserted, that the Commissioner with-

out cause disbelieved the evidence of respondent and believed the evidence of witnesses who had been discredited. The record supports a justification for disbelieving much of respondent's evidence. The evidence of respondent in many respects was contradicted by documentary evidence. In some instances, his evidence is unbelievable. For example, respondent testified he had no knowledge that after 1940 McDonald was soliciting cases. Not only that but respondent stated before the Commissioner that he did not know even then that McDonald's cases which were referred to respondent had been solicited. Respondent testified before the Committee in the summer of 1946. In June of that year, he wrote a letter to McDonald to the effect that if the two cases then being offered were cases in which the Railroad Brotherhood had an interest, he would not want them. However, if the Brotherhood had no interest in the fee, then he would take the cases. The letter indicates that respondent was suspicious that McDonald was splitting fees with the Brotherhood. For the rule in Missouri governing the dealings of the Brotherhood with lawyers in personal injury cases, see *Hulse* v. *Brotherhood of Railroad Trainmen,* 340 S.W.2d 404. Respondent, even at the final hearing, claimed that he had no grounds to suspect that McDonald was soliciting cases until [34] after the present charges were filed in 1956. The Commissioner did not believe that. Neither do we.

A number of witnesses, former clients of respondent, testified in support of respondent's theory that the clients employed the investigators and agreed with them for their pay; further, that the cases were not solicited for the respondent. A number of these witnesses had been interviewed by a representative of the Advisory Committee while the investigation was in progress. This representative of the Committee, a lawyer of good repute, testified

at the hearing before the Commissioner. The evidence of the clients at the hearing was in some respects at variance with statements alleged to have been made earlier to the representative of the Committee. For example, W. W. Goodner, whose case was settled in 1952 for $43,150, testified that he wrote to Randolph about his case because he had heard of him through others who had been injured; that he employed Fenn as his investigator and paid him for his services; that while at Randolph's office, Randolph figured how much money had been advanced to him (by Randolph), also the expense of taking depositions, and "We figured up Norman Fenn's fee along with that." The settlement sheet (Ex. 11-24) shows a deduction of $770 due for loans from the Railroad Retirement Board, various items such as loans and advances by Randolph (22 in number) for a total of $4,025, and respondent's attorney fee of $9,572.55. The sheet shows "net ck to Goodner" as $28,708.95. However, the paper does not make any reference to the fee to be paid to Fenn. This fee is shown by a cashier's check in the sum of $4,786.28, one half as much as the attorney fee. With Randolph's check for $28,708.95, two cashier's checks were purchased: one to Goodner for $23,922.67; and one to Fenn for the fee mentioned. So, Goodner was mistaken that Fenn's fee was figured in the settlement sheet. The representative of the Advisory Committee testified that Goodner told him that Fenn's fee was not more than $500.

O. V. Beck testified for respondent. According to his [35] evidence, his case was settled about the same way as Goodner's; further, that he employed Fenn as the investigator. The representative of the Advisory Committee testified that Beck told him "that Fenn did not do anything in regard to his case" and that he knew of no cashier's check made payable to Fenn. The record shows that Fenn received a cashier's check for $2,075.19.

An examination of the evidence of the above two witnesses and others has convinced us that they were well coached by respondent and his investigators as to how their cases were handled. The letter to Mrs. Mayhon, *supra*, supports our conclusion.

Beck, in an affidavit written in longhand, minutely detailed the manner in which his case was handled by Randolph. An examination of this affidavit, along with the letters written by respondent to Mrs. Mayhon, indicates that it was dictated or prepared by respondent.

A number of witnesses, testifying in support of the charges, were to some extent impeached and contradicted. In some of these instances, the statements of such witnesses made at the hearing before the Commissioner contradicted their statements made previously to an investigator for respondent. However, the documentary evidence supports the charges made and corroborates the evidence in support of the charges. The fact that in practically all of these cases the fee of the so-called investigator amounted to one half of the amount of the attorney's fee and the fact that respondent was very careful to see that the investigator was paid support the finding of the Commissioner that the cases were solicited and that the investigators were paid primarily for having the injured person employ respondent. In the case of *In re Frankel*, 20 N.J. 588, 120 A.2d 603, a disbarment proceeding, a similar question was before the court. The claim was there made that the investigator was paid a certain per cent of the amount the client received for investigating the case. We quote what the court there said as applicable to the case before us (120 A.2d l.c. 606): "This standard of [36] renumeration does not comport with the hypothesis of investigational service, varying as it would in time and effort according to the exigencies of the particular case, but rather betokens

a sharing of the earned net legal fee on a fixed percentage basis for bringing the case to Frankel. This is clear beyond peradventure. The method of compensation is a distinctive symbol of the latter; it is in its very nature repugnant to the theory of recompense for purely investigational endeavors."

An examination of the record in the case before us and the report of the Special Commissioner has led us to the conclusion that the Commissioner was extremely charitable in his findings of fact and in his recommendation as to the disciplinary action.

We apologize for the length of this opinion. Respondent's continued insistence all through the hearings that the charges against him were untrue and contentions made in his brief and by his counsel in oral argument that the evidence wholly failed to sustain the charges caused us to set out verbatim some of the evidence and occasioned our extensive discussion of what the record shows.

In view of the conclusions we have reached, it will not be necessary to pass on the exceptions of the Advisory Committee to the ruling of the Special Commissioner finding respondent not guilty of violating Rules 4.10 and 4.42. These charges involved advances of money made to clients pending settlements of their claims.

We now turn to a consideration of what disciplinary action should be taken in this case. The main purpose of a proceeding of this nature is to make an inquiry into the fitness of an attorney to continue in the practice of law. Its main objective is not to punish the attorney but the protection of the public and the maintenance of the integrity of the profession and of the courts. The subject has been considered so often that we deem it sufficient to make reference to a number of cases and authorities and so shall not

discuss the subject at length. See *In re Conner*, Mo., 207 S.W.2d 492, l.c. 498, 499 (13) (14, 15); *In re* [37] *Speiser*, Mo., 294 S.W.2d 656, l.c. 665 (4, 5); *In re McLendon*, Mo., 337 S.W.2d 56, l.c. 61 (2); *In re Moon*, Mo., 310 S.W.2d 935, l.c. 938, 939 (3); *In re Introcaso*, N.J., 140 A.2d 70, l.c. 74 (2) (3); *In re Frankel*, N.J., 120 A.2d 603, l.c. 607 (4); *Johnson* v. *State Bar of California*, Cal., 73 P.2d 1191, l.c. 1194 (3, 4); *In re Morrow*, Oregon, 329 P.2d 482, l.c. 486 (2-4); *In re Fisher*, Ill., 153 N.E.2d 832, l.c. 840 (11-15); *Memphis & Shelby County Bar Association* v. *Vick*, Tenn., 290 S.W.2d 871, l.c. 875 (1); 7 C.J.S. 770-774, Sec. 28.

Disbarring an attorney is a very serious matter. It brings disgrace upon him and deprives him of the right to engage in work for which he has prepared himself through years of schooling. If the attorney has borne a good reputation, the disbarment results in besmirching his good name. These considerations must be taken into account. However, they cannot stand in the way in cases where the public interest requires disbarment. If a lawyer has so conducted himself that his continuance as a member of the Bar will adversely affect the public interest, his name should be removed from the membership rolls of the legal profession. In the case before us, we are dealing with an attorney who through a long number of years engaged in the practice of knowingly taking cases that were brought to his office by laymen and splitting fees with them on a percentage basis. The actual practice in its ultimate result was a solicitation of personal injury cases by laymen and a splitting of fees. *In re Heirich*, 67 A.L.R.2d 827, Annotations, 882, Sec. 8, and 898, Sec. 9. The smoke screen thrown about the transactions to obscure the true facts becomes transparent upon an examination of the record before us. Further consideration must be given to the conduct of respondent during the time his activities were being investigated. See *In re Heirich*, 67

A.L.R.2d 827, Annotations, 927, Sec. 19. The coaching of his former clients as to what to say to any person making inquiry about respondent, as revealed in the letters to Mrs. Mayhon, quoted *supra;* the charges made against the members of the Advisory Committee and its [38] attorneys; respondent's continued denial that he did not know and had no grounds to suspect that McDonald was soliciting cases when, in fact, respondent had actual knowledge of McDonald's practice—are all facts to be taken into consideration in what disciplinary action should be taken. As we have said *supra,* the Special Commissioner was very charitable to respondent in the findings of facts as well as in his recommendation that respondent be suspended for one year. In the case of *In re Frankel, supra,* the New Jersey Supreme Court had before it a case somewhat similar to that before us. For three years Frankel had been soliciting cases through a layman and splitting fees with him. The court suspended Frankel for three years. It was stated in the opinion that, due to the fact that it was the first case under the then rules of the court, disbarment would not be ordered. Two of the judges dissented and were of the opinion that disbarment should be the order. The practice of soliciting cases and splitting fees with laymen through whom cases were obtained has long been condemned. *In re Gallant,* Mo., 95 S.W.2d 1249; *State ex rel.* v. *Goldman,* Neb., 255 N.W. 32, l.c. 35, 36 (5); *Howe* v. *State Bar of California,* Cal., 298 Pac. 25, l.c. 28 (5) (6); *People* v. *Gray,* Cal., 127 P.2d 72, l.c. 90 (22); 7 C.J.S., 758, 759, Sec. 23h, and cases cited under notes 50, 51, 52, and 53.

In the principal opinion, as well as in the dissenting opinion, in the *Frankel* case, *supra,* the court reviewed at length authorities on the evil of "ambulance chasing." It would serve no useful purpose to review the subject here.

The practice has been condemned for many years by this court in many cases. Ambulance chasing and splitting fees with laymen lead to many evils. Such practices are unfair to the other members of the Bar. To meet the competition occasioned by these practices, some lawyers engage in such practices who otherwise would not think of doing so. Corruption, such as bringing forth spurious cases and perjury, often result from the unethical practices which tend to degrade the legal profession and breed disrespect for the courts. In [39] general, solicitation of cases and splitting fees with laymen are in all respects detrimental to the public interest.

We would be derelict in our duty if our order would do less than disbar respondent from the practice of law. His long continued practice of the evils described deserves nothing less. 5 Am. Jur. 425, 426, Sec. 274.

It is the order of this court that C. A. Randolph be disbarred from the practice of law and that his name be ordered stricken from the roll of attorneys in the courts of this state. The costs of this proceeding are taxed against respondent.

It is so ordered.

Henry J. Westhues,
Henry J. Westhues, Judge.

All concur except Leedy, J., not sitting.

EXHIBIT C.

IN THE SUPREME COURT OF MISSOURI
EN BANC

APRIL SESSION, 1961

No. 45936

IN RE C. A. RANDOLPH

Respondent's Motion for Judgment of Acquittal or for a Rehearing.

Now comes C. A. Randolph, Respondent in the above cause and moves the Court to set aside its opinion, order and judgment entered and filed herein on the 8th day of May, 1961, and enter judgment of acquittal or in the alternative grant Respondent a rehearing in said cause, and as grounds therefor alleges and states:

I

There is no evidence and no substantial or credible evidence, in the record in said cause upon which to base the Court's said findings, order, or judgment herein, thereby depriving Respondent of due process of law and the equal protection of the laws guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, the protective benefits of which Respondent hereby invokes.

II

The Court inadvertently overlooked and failed to consider the fact a license to practice law is a vested property

right protected by the Fourteenth Amendment to the Constitution of the United States although raised on pages 104 and 105 of Respondent's brief herein.

III

The Court inadvertently overlooked and failed to consider the fact in determining whether or not a citizen is deprived of his right to practice law in violation of the Fourteenth Amendment of the Constitution of the United States the question as to what inferences may legally be drawn is governed by decisions of the federal courts, although raised on page 105 of Respondent's brief.

IV

The Court erred and deprived Respondent of his Constitutional rights in drawing illogical and unwarranted inferences unsupported by and contrary to the evidence thus failing to comply with the Federal rule in determining the sufficiency of the evidence and what inferences might legitimately and justifiably be drawn as pointed out under paragraph 2 above.

V

In failing and refusing to give Respondent the benefit of the settled rule of law that Respondent's testimony should be accorded evidentiary weight because of his good reputation (Opinion P. 3) and should not be overturned by the testimony of unscrupulous clients who are discredited and impeached and shown to have improper and ulterior motives, the Court denied Respondent equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

VI

In criticising Respondent and basing in part (Opinion PP. 27-32) the order of disbarment on Respondent's resistance and opposition to the officers of the Court charged with the investigation and prosecution of the charges in this Court deemed necessary to his proper defense the Court has deprived Respondent of the right in this adversary proceeding to defend himself (discussed on pages 141-144 of Respondent's Brief) and has thereby deprived him of the equal protection of the law and of due process of law guaranteed him under the Fourteenth Amendment to the Constitution of the United States.

VII

In holding Respondent charged with knowledge of the contents of decisions in the foreign jurisdictions of Wisconsin, Minnesota and California (Opinion PP. 6, 7, 8) tending to discredit McDonald and Dahl, not heretofore cited in this case and never seen or read by respondent, this Court has deprived him of the equal protection of the law and deprived him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII

Rule of the Supreme Court of Missouri setting up the machinery and outlining the procedure for disciplining and disbarring lawyers in the State of Missouri in operation combines and commingled all of the executive, legislative, and judicial powers in such proceedings in this Court, in violation of Article II, Sec. 1, Mo. Const. 1945, discourages, hinders and thwarts lawyers from defending themselves against such charges made against them and puts this Court under obligation to the lawyers giving their services

without compensation to the disciplinary work of the Bar and violates the concepts of fundamental fairness under the provisions of the Fourteenth Amendment to the Constitution of the United States which is designed to head off arbitrary or discriminatory state action.

IX

In criticising Respondent and basing in part the order of disbarment on the letters Respondent wrote a former client in defense against statements of investigators for the Bar Committee during the investigation stage and before proceedings were instituted against him the Court (Opinion PP. 27-30) denied him his right of free speech and deprived him of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States and under the First Amendment to the Constitution of the United States.

X

In holding this Court has original jurisdiction to try Respondent in a disbarment proceeding although no original jurisdiction is conferred upon said Court by the Missouri Constitution except to issue remedial writs, the Court's said holding is arbitrary and discriminatory and violated due process of law and the equal protection of the law guaranteed Respondent under the Fourteenth Amendment to the Constitution of the United States.

XI

This Court is erroneously assuming jurisdiction as a court of original jurisdiction to try Respondent in these proceedings under the erroneous concept of a license to practice law as being a mere privilege which this Court may give and may take away at will, instead of a right.

It is contrary to the federal rule invoked under Paragraph II of this Motion.

XII

In taking sworn statement of witnesses ex parte which were received in evidence against Respondent as the testimony of such witnesses Respondent was denied his constitutional right of confrontation of witnesses under the Sixth Amendment to the Constitution of the United States and Article I, Section 18 (a) of the Constitution of Missouri, 1945, and thereby deprived Respondent of due process and equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution, although such witnesses were thereafter belatedly produced for cross-examination by counsel for Respondent, this being in the nature of a criminal proceeding.

XIII

In accepting as establishing Respondent's guilt the ex parte testimony of witnesses as stating the true facts and ignoring and refusing to believe their testimony as modified at a later time when subjected to cross-examination the Court deprived Respondent of equal protection of the law and of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States by violating and refusing to follow the settled rule of law that a party to an adverse proceeding such as this is entitled to be present during the direct testimony of a witness followed by the right to cross-examine such witness immediately after his direct examination, which procedure is an essential part of the common law and Constitutional concepts of a fair trial and of due process and equal protection of the law.

XIV

The Court erroneously adopted the findings of fact and conclusions of law of its Special Commissioner herein, in that the record and the evidence therein do not support the findings and conclusions of law of either this Court or its said Commissioner.

And of the above matters Respondent prays the judgment of the Court.

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and

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Kansas City 6, Missouri
Attorneys for Respondent

IN THE SUPREME COURT OF MISSOURI
EN BANC.

APRIL SESSION, 1961.

IN RE C. A. RANDOLPH No. 45936.

RESPONDENT'S SUGGESTIONS IN SUPPORT OF HIS MOTION FOR JUDGMENT OF ACQUITTAL OR FOR A REHEARING.

Comes now C. A. Randolph, Respondent herein, and respectfully submits the following suggestions in support of his Motion for Judgment of Acquittal or in the Alternative for a New Trial:

I.

It Is a Violation of the Federal Due Process Clause to Convict and Punish a Man Without Substantial Evidence of His Guilt.

Thompson v. *City of Louisville*, 80 S. Ct. 624, 628;
Schware v. *Board of Bar Examiners of State of N. M.*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796;
Fourteenth Amendment to the Constitution of the United States.

II.

A License to Practice Law Is a Vested Property Right Entitled to Constitutional Protection and Not a Mere Privilege Which May Be Given or Taken Away at Will.

Schware v. *Board of Bar Examiners*, 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796.

III.

Decisions of the Federal Courts Govern As to the Sufficiency of the Evidence to Support Conviction and What Inferences May Legally Be Drawn in Determining Federal Constitutional Questions.

Schware v. *Board of Law Examiners,* 353 U.S. 232, 247, 77 S. Ct. 752, 761, 1 L. Ed. 2d 796;

Konigsberg v. *State Bar of California,* 353 U.S. 252, 262, 273, 177 S. Ct. 722, 728, 733;

Niemotko v. *State of Maryland,* 340 U.S. 268, 271, 71 S. Ct. 325, 327;

Crowell v. *Benson,* 285 U.S. 22, 60, 52 S. Ct. 285, 296.

IV.

The Court Erred in Failing to Comply with the Federal Rule in Determining the Sufficiency of the Evidence and What Inferences Might Properly Be Drawn in Determining Federal Constitutional Questions.

Crowell v. *Benson,* 285 U.S. 22, 52 S. Ct. 285, 296;

Dyama v. *State of California,* 332 U.S. 633, 68 S. Ct. 269, 270.

V.

The Court Erred in Failing to Give Proper Weight to Respondent's Testimony in the Light of the Undisputed Testimony of Respondent's Good Reputation.

In re Frith, (Mo. Sup.) 233 S.W.2d 707;

In re Mason, (Mo. App.) 203 S.W.2d 717;

In re Moon, Mo. Sup., 310 S.W.2d 935, 938.

VI.

The Court Erred in Condemning Respondent for Taking Steps Deemed Necessary to His Defense Against the Actions of Investigators for the Bar Committee.

In re Gardner, (Mo. App.) 119 S.W.2d 50, 60;
Morgan v. *United States,* 304 U.S. 1, 14-15, 20, 58 S. Ct. 773, 777;
In re Pate, (Mo. App.) 107 S.W.2d 157;
In re Summers, 325 U.S. 561, 65 S. Ct. 1307, 1311.

VII.

The Court Erred in Holding Respondent Charged with Knowledge of Court Decisions in the Foreign Jurisdictions of Wisconsin, Minnesota and California Tending to Discredit McDonald and Dahl Which Respondent Had Never Seen or Read.

Rule 55.23, Missouri Supreme Court;
Woodward v. *Bush,* 282 Mo. 163, 220 S.W. 839, 844 (6);
First Nat. Bank & Trust Co. of Muskogee v. *Heilman,* 10 Cir., 62 F.2d 157, 159 (4);
Smeltzer v. *White,* 92 U.S. 390, 23 L. Ed. 508.

VIII.

Disciplinary Procedure under Rule 5 of This Court Combines the Executive, Legislative and Judicial Power in This Court Thereby Violating the Constitutional Requirement of Separation of Powers and the Concept of Fundamental Fairness in Violation of the Fourteenth Amendment to the Constitution of the United States and of the Missouri Constitution.

O'Donoghue v. *United States,* 289 U.S. 516, 530, 53 S. Ct. 740, 743;
Adamson v. *People of State of California,* 332 U.S. 48, 53, 67 S. Ct. 1672, 1676;

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625;
Wong Yang Sung v. *McGrath*, 339 U.S. 33, 50, 70 S. Ct. 445, 450, 454;
Oyama v. *State of California*, 332 U.S. 633, 68 S. Ct. 269, 270.

IX.

Criticism in the Opinion of Respondent Because of Letters Written Former Clients in Defense of Actions by Investigators for the Bar Committee Violates Respondent's Right of Free Speech Guaranteed by the First Amendment to the Constitution of the United States, and Violates Article I, Section 8 of the Constitution of Missouri, 1945.

Near v. *State of Minnesota*, 283 U.S. 697, 717, 718, 51 S. Ct. 625, 631.

X.

This Court Is Without Jurisdiction to Try Respondent As a Court of Original Jurisdiction.

Article V, Sections 1 and 4, Missouri Constitution, 1945.

XI.

This Court Erroneously Assumed Original Jurisdiction of This Proceeding under the Erroneous Conception of a License to Practice Law As a Mere Privilege and Not a Vested Property Right.

In re Sizer, (Mo. App.) 134 S.W.2d 1085, 1118 (15);
In re Lacy, 234 Mo. App. 71, 112 S.W.2d 594, 604 (6);
State ex rel. Morton v. *Cave*, 359 Mo. 72, 220 S.W.2d 45, 53 (16);
In re Conner, (Mo. Sup.) *en Banc*, 357 Mo. 270, 207 S.W.2d 492, 499 (15);
Schware v. *Board of Bar Examiners*, 353 U.S. 232, 238, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796.

XII.

Introducing Ex Parte Statements of Witnesses As Their Direct Testimony Deprived Respondent of His Right of Cross Examination in Violation of His Rights under the Constitution of the United States and the Constitution of Missouri Although Such Witness Was Later Produced for Cross-Examination.

Sixth Amendment to the Constitution of the United States;

Article I, Section 18 (a), Constitution of Missouri, 1945;

Kirby v. *United States,* 174 U.S. 47;

Dowdell v. *United States,* 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753.

XIII.

Accepting Ex Parte Testimony of Witnesses As Establishing Respondent's Guilt and Rejecting Their Modified Testimony at a Later Date When Submitted for Cross-Examination Deprived Respondent of Equal Protection of the Law and Due Process of the Law in Violation of the Fourteenth Amendment to the Constitution of the United States.

See cases cited under Point IX, *supra.*

XIV.

This Court Erroneously Adopted the Findings of the Special Commissioner in That the Record and Evidence Herein Do Not Support Such Findings of Fact and Conclusions of Law of Said Commissioner or of This Court Based Thereon.

See cases cited under Point I, *supra.*

For all the reasons set forth in Respondent's Motion for Judgment of Acquittal or in the Alternative for a New Trial filed herein and in these supporting suggestions we

respectfully submit that a submissible case was not made against this respondent and judgment of acquittal should now be entered, or if that is not done a rehearing should be granted herein.

Respectfully submitted,

Walter A. Raymond
1313 Home Savings Building
1006 Grand Avenue
Kansas City 6, Missouri

and

Paul Barnett
1011 Commerce Building
Kansas City 6, Missouri
Attorneys for Respondent

Certificate of Service.

I hereby certify that I served the Respondent's Motion for Judgment of Acquittal or in the Alternative for a New Trial and these supporting suggestions on the Prosecutors herein by mailing one copy to Mr. Gene Thompson, Maryville, Missouri, and one copy to Mr. Robert L. Ross, Albany, Missouri, attorneys of record for the Advisory Committee, prosecutors herein, this 20 day of May, 1961.

/s/ Walter A. Raymond,
Of Counsel for Respondent.

EXHIBIT D.

Order of Missouri Supreme Court Overruling Respondent's Motion for Judgment of Acquittal or Rehearing.

"And thereafter and on the 12th day of June, 1961, the further proceedings were had and entered of record in said cause, to-wit:

45936 - In re: C. A. Randolph, Respondent,

Now at this day, the court having seen and considered respondent's motion for judgment of acquittal or for a rehearing, doth order that said motion be, and the same is hereby overruled."

EXHIBIT E.

Order of Missouri Supreme Court Staying Enforcement of Judgment to Permit Application for Certiorari.

"And thereafter and on the 26th day of June, 1961, the following further proceedings were had and entered of record in said cause, to-wit:

45936 - In re: C. A. Randolph, Respondent,

Now at this day the court having seen and considered respondent's application for stay of enforcement of judgment in the above entitled cause, doth order that said application be, and the same is hereby sustained and the enforcement of the judgment is ordered stayed for 90 days from June 12, 1961, to enable respondent to apply for certiorari in the Supreme Court of the United States."

EXHIBIT F (SUPPLEMENT TO SUB-HEADING (F)).

Constitutional Questions Presented.

The Federal Constitutional questions were timely raised before the Commissioner and were denied and overruled by the Commissioner (Comm. Rep. 204, 205), and before the Missouri Supreme Court, but, and not specifically considered or ruled by the Missouri Supreme Court, but the necessary effect of the ruling of the Court was to overrule and deny Petitioner's claim of violation of his Constitutional rights.

Petitioner filed a typewritten brief with the Commissioner to be considered by him in preparing his report in which it was stated (Brief on Behalf of C. A. Randolph, before Commissioner, pp. 10-12):

> "* * * But the fact remains that the constitution of the United States and of the State of Missouri provide that life, liberty or property shall not be taken without due process of law.
>
> "Amendments, Art. VI, U. S. Constitution
>
> "Sec. 10, Art. I, Mo. Constitution
>
> "Consequently, the fact that the State in a criminal prosecution is only acting for the protection of the public cannot be allowed to obscure the fact that the direct and immediate result of a criminal prosecution, if successful, is to deprive a citizen, sometimes of life, sometimes of liberty, and sometimes of property in the form of a fine. Neither can the fact that the ultimate purpose of the State (acting through a legally organized bar committee) is the protection of the public and the courts, obscure the fact that the only direct and immediate effect of a successful prosecution for disbarment will be to deprive a lawyer of his

good name and his livelihood. It is well established that *the right of an attorney to practice law is a valuable property right* which cannot be taken away from him except upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense in a manner which complies with due process.

"*State ex rel. Shackelford* v. *McElhinney*, 241 Mo. 592, 145 S.W. 1139.

"*Dittmeier* v. *Mo. Real Estate Commission*, (Mo. Sup.) 316 S.W.2d 1.

"*State ex rel. Spriggs* v. *Robinson*, 253 Mo. 271, 161 S.W. 1169, 1172.

"*State ex rel. Hurwitz* v. *North*, 304 Mo. 607, 264 S.W. 678, 681.

"*In re Sparrow*, 338 Mo. 203, 90 S.W.2d 401, 403.

"*Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 728.

"*Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 77 S. Ct. 752.

"It is true that the Missouri Courts have said that a lawyer has no vested right to *continue* to practice law; but those cases only hold that the lawyer's vested property right can be forfeited for abuse thereof. This rule is applicable to all vested property rights. It is evident in cases wherein forfeiture of a man's property has been sustained because he illegally used it to operate a gambling house, or where he imported it into the country without paying the duty thereon, or transported it in violation of the Food and Drug Act. But in determining whether he did the acts for which forfeiture may be enforced, he is entitled to a hearing which fully meets the requirements of due process of law.

"It is therefore plain that a lawyer's license cannot be taken from him unless he is afforded a full opportunity to defend himself. But he cannot defend unless he is attacked. Under the constitution there must

be one who attacks and one who defends. This makes the statement that this proceeding is not an adversary proceeding a meaningless and an illusory pronouncement, the purpose of which must be carefully restrained within constitutional limits. The weight and sufficiency of evidence, though classed as procedural, are evolved from rules that go to the guilt or innocence, the liability or non-liability of the defendant. They may not be ignored or prostituted without denying due process of law. They are not rules, the sole purpose of which is to provide orderly procedure. They have been worked out over a long period of time so that triers of fact will not be allowed to make findings of fact upon suggestions, or suspicions which have no tendency to prove the facts. Consequently, although the states, through their legislatures and courts, may change such rules within limits, they are prohibited by the constitutional provisions above cited from denying the right of cross-examination or from treating as evidence of facts that which does not tend to prove such facts.

"*Dowell* v. *U. S.*, 221 U.S. 325, 31 S. Ct. 590, l.c. 592.

"*State ex rel. Hurwitz* v. *North*, 304 Mo. 607, 264 S.W. 678.

"*Manley* v. *State of Georgia*, 279 U.S. 1, 49 S. Ct. 215."

In the report of the Special Commissioner at pages 204 and 205, it is stated:

"Nor may Respondent's license to practice law be suspended or taken away from him without due process of law. In this case, it has been argued that the Advisory Committee's *ex parte* interrogation of some of Respondent's former clients, and the use of information so obtained by the Advisory Committee violated the due process clauses of the State and Federal Constitutions in that it deprived him of the right of confrontation of the witnesses. The Commissioner believes that such investigation by the Advisory Com-

mittee was proper. *In re Sparrow*, 90 S.W.2d 401; *In re Lacy*, 112 S.W.2d 594, but desires to point out that the conclusions reached in this case are based upon testimony received by the Commissioner, and such *ex parte* testimony has been considered only in cases where the opportunity for cross-examination was provided and Respondent availed himself of that opportunity. The Commissioner agrees with Respondent that the State of Missouri, through its Legislature and Courts may not change the procedural rules under which Respondent is entitled to due process of law, but for the reasons heretofore given, the Commissioner does not believe that Respondent has been deprived of due process of law by the application of any Statute or Rule depriving him of the right of cross-examination in this case. The controversy between the Advisory Committee and Respondent concerning whether this disciplinary proceeding is an adversary proceeding seems to have been resolved in cases such as *In re Falzone*, 220 S.W.2d 765, in which it was specifically held that a disbarment proceeding is not an adversary proceeding (l.c. 774)."

In Respondent's printed brief filed in the Supreme Court of Missouri prior to oral argument and submission to that Court, it is stated (pp. 68 and 69):

"IV.

"The Commissioner, by Basing His Findings of Respondent's Guilt upon Non-Permissible and Improper Inferences, Denied Respondent Due Process of Law and the Equal Protection of the Law Guaranteed to Him by Amendment XIV of the Constitution of the United States, Because

"A. The right to practice law is a vested property right protected by Amendment XIV of the Constitution of the United States.

"*Shackelford* v. *McElhinney*, 241 Mo. 592, 145 S.W. 1139.

"*State ex rel. Spriggs* v. *Robison*, 253 Mo. 271, 161 S.W. 1169, 1172.

"*Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 756, 1 L. Ed. 2d 796.

"B. What inferences may legally be drawn in determining whether a lawyer shall be permitted to practice law are Federal questions governed by the decisions of the courts of the United States.

"*Niemotko* v. *State of Maryland*, 340 U.S. 268, 71 S. Ct. 325, 327.

"*Crowell* v. *Benson*, 285 U.S. 22, 52 S. Ct. 285, 296.

"*Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 77 S. Ct. 752.

"*Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722.

"*In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376.

"*Feiner* v. *New York*, 340 U.S. 315, 71 S. Ct. 303.

"*In re Summers*, 325 U.S. 561, 65 S. Ct. 1307.

"C. The Federal questions raised under this point, in sub-points A and B are timely raised in this brief.

"*International Harvester Co.* v. *State of Missouri*, 234 U.S. 199, 34 S. Ct. 859, 58 L. Ed. 1278.

"*Consolidated Coal Co.* v. *People of State of Illinois*, 185 U.S. 203, 22 S. Ct. 616.

"*Schuylkill Trust Co.* v. *Commonwealth of Pa.*, 296 U.S. 113, 58 S. Ct. 31, 80 L. Ed. 91.

"*Ohio* v. *Metropolitan Park Dist.*, 281 U.S. 74, 79, 50 S. Ct. 228, 74 L. Ed. 710."

Respondent's printed brief in Missouri Supreme Court (pp. 104-105):

"The Commissioner, by Basing His Findings of Respondent's Guilt upon Non-Permissible and Improper Inferences, Denied Respondent Due Process of Law and the Equal Protection of the Law Guaranteed to Him by Amendment XIV of the Constitution of the United States.

"There have been some cases in which the Missouri courts have said that a license to practice law is a mere privilege which may be forfeited for misconduct. A license to practice medicine or to sell real estate may likewise be forfeited for misconduct. Physical property may be forfeited on that account, which is made manifest by forfeitures of a man's property because he illegally used it to operate a gambling house, because he imported it into the country without paying the duty thereon, or because he transported it in violation of the Food and Drug Act. The fact remains that the license to practice law is a property right protected by the Fourteenth Amendment of the Constitution of the United States according to the decisions of this Court and those of the Supreme Court of the United States.

"*Shackelford* v. *McElhinney*, 241 Mo. 592, 145 S.W. 1139.

"*State ex rel. Spriggs* v. *Robison*, 253 Mo. 271, 161 S.W. 1169, 1172.

"*Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796.

"It is further established that, in determining whether or not a man's right to practice law is guaranteed by the Fourteenth Amendment of the Federal Constitution, the questions as to what inferences may legally be drawn are federal questions governed by the decisions of the federal courts.

"(See cases cited under Points Relied On IV-B.)

"If, in the opinion of the Supreme Court of the United States, a man has been deprived of a license to

practice law upon charges which are supported by what they deem to be improper inferences or against the decided weight of the evidence, a state decision disbarring a lawyer or suspending his right to practice will not be permitted to stand.

"In the instant case there was nothing in the information to indicate that there would or could be a finding against respondent against the great weight of the evidence and supported by what the Supreme Court of the United States considers to be improper inferences. The rules of this court do not require any exceptions to be filed to the Commissioner's report. In these circumstances the first opportunity to raise such a question is when respondent's brief is filed. Therefore, this Federal question is timely raised.

(See Authorities cited under Points Relied On IV-C.)"

Respondent's printed brief in Missouri Supreme Court (p. 96):

"The Commissioner in ruling (Report 180, 205) he will accept and believe what Mrs. Jarboe, Smith, Carignan and Tuggle testified to during their secret, *ex parte*, testimony, when Respondent was not present or represented, instead of their later testimony on cross-examination in a formal hearing when the two first-named witnesses supported Respondent and the two last-named were thoroughly discredited; in ruling (Report 205-206) that he may and did consider evidence adduced before the Advisory Committee but not offered or admitted into his record, especially when he made an order that he would not do so (Vol. I, 2, 5, 6, 8; Vol. VII, 1729); In considering the testimony of O. C. Brown (Report 179-80) whose testimony had not been received into his record, he not only violated and deprived Respondent of whatever protection Sec. 5.03, Rule 5, of this Court gave Respondent in lieu of a right to confrontation as to said first-named four witnesses, but he thereby virtually

decided all the charges in the Information against Respondent on the basis of such *ex parte* testimony, because of the similarity of the charges in all the counts, and thereby deprived Respondent of due process of law and the equal protection of the laws in violation of the Constitution of the United States, upon which Respondent relies and hereby invokes under Point IV in this brief."

(p. 141:)

"VIII.

"Respondent Is Entitled under the XIV Amendment of the Federal Constitution to All the Rights and Protection That Must Be Accorded in an Adversary Proceeding."

(p. 142:)

"* * * There is no adversary proceeding until the indictment is filed. From then on the Advisory Committee sheds its role as a grand jury and performs the office of a prosecuting attorney in criminal cases.

"But when that stage is reached the rules of this court have eliminated any laxity concerning the admissibility or the effect of evidence, or the necessity for procedure which will accord to the respondent all the protection that is required by the constitutional provisions of the federal and state constitutions guaranteeing due process of law and the equal protection of the law.

"*Ex parte Robinson*, 19 Wall. 505, 22 L. Ed (U.S.) 205.

State ex rel. Anderson v. *Becker*, 306 Mo. 1193, 34 S.W.2d 27, 29.

In re Rosser, (C.C.A. 8) 101 Fed. 562, 597."

(p. 143:)

"The United States Supreme Court, in the recent case of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 257-258, 77 S. Ct. 722, said,

"'While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study * * *', etc."

"(See authorities cited under Points Relied on IV-C.)"

In Respondent's Motion for Judgment or Acquittal or for a Rehearing filed in the Supreme Court of Missouri following the filing of the opinion of that Court (set out at pages A60 to A65 of the Appendix hereto) your Petitioner stated:

"I

"There is no evidence and no substantial or credible evidence, in the record in said cause upon which to base the Court's said findings, order, or judgment herein, thereby depriving Respondent of due process of law and the equal protection of the laws guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, the protective benefits of which Respondent hereby invokes.

"II

"The Court inadvertently overlooked and failed to consider the fact a license to practice law is a vested property right protected by the Fourteenth Amendment to the Constitution of the United States although raised on pages 104 and 105 of Respondent's brief herein.

"III

"The Court inadvertently overlooked and failed to consider the fact in determining whether or not a citizen is deprived of his right to practice law in violation of the Fourteenth Amendment of the Constitution of the United States the question as to what inferences may legally be drawn is governed by decisions of the federal courts, although raised on page 105 of Respondent's brief.

"IV

"The Court erred and deprived Respondent of his Constitutional rights in drawing illogical and unwarranted inferences unsupported by and contrary to the evidence thus failing to comply with the Federal rule in determining the sufficiency of the evidence and what inferences might legitimately and justifiably be drawn as pointed out under paragraph 2 above.

"V

"In failing and refusing to give Respondent the benefit of the settled rule of law that Respondent's testimony should be accorded evidentiary weight because of his good reputation (Opinion P. 3) and should not be overturned by the testimony of unscrupulous clients who are discredited and impeached and shown to have improper and ulterior motives, the Court denied Respondent equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

"VI

"In criticising Respondent and basing in part (Opinion PP. 27-32) the order of disbarment on Respondent's resistance and opposition to the officers of the Court charged with the investigation and prosecution of the charges in this Court deemed necessary to his proper defense the Court has deprived Respondent of the right in this adversary proceeding to de-

fend himself (discussed on pages 141-144 of Respondent's Brief) and has thereby deprived him of the equal protection of the law and of due process of law guaranteed him under the Fourteenth Amendment to the Constitution of the United States.

"VII

"In holding Respondent charged with knowledge of the contents of decisions in the foreign jurisdictions of Wisconsin, Minnesota and California (Opinion PP. 6, 7, 8) tending to discredit McDonald and Dahl, not heretofore cited in this case and never seen or read by Respondent, this Court has deprived him of the equal protection of the law and deprived him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

"VIII

"Rule 5 of the Supreme Court of Missouri setting up the machinery and outlining the procedure for disciplining and disbarring lawyers in the State of Missouri in operation combines and commingled all of the executive, legislative and judicial powers in such proceedings in this Court, in violation of Article II, Sec. 1, Mo. Const. 1945, discourages, hinders and thwarts lawyers from defending themselves against such charges made against them and puts this Court under obligation to the lawyers giving their services without compensation to the disciplinary work of the Bar and viclates the concepts of fundamental fairness under the provisions of the Fourteenth Amendment to the Constitution of the United States which is designed to head off arbitrary or discriminatory state action.

"IX

"In criticising Respondent and basing in part the order of disbarment on the letters Respondent wrote a former client in defense against statements of investigators for the Bar Committee during the investi-

gation stage and before proceedings were instituted against him the Court (Opinion PP. 27-30) denied him his right of free speech and deprived him of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States and under the First Amendment to the Constitution of the United States.

* * *

"XII

"In taking sworn statements of witnesses ex parte which were received in evidence against Respondent as the testimony of such witnesses Respondent was denied his constitutional right of confrontation of witnesses under the Sixth Amendment to the Constitution of the United States and Article 1, Section 18 (a) of the Constitution of Missouri, 1945, and thereby deprived Respondent of due process and equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution, although such witnesses were thereafter belatedly produced for cross-examination by counsel for Respondent, this being in the nature of a criminal proceeding.

"XIII

"In accepting as establishing Respondent's guilt the ex parte testimony of witnesses as stating the true facts and ignoring and refusing to believe their testimony as modified at a later time when subjected to cross-examination the Court deprived Respondent of equal protection of the law and of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States by violating and refusing to follow the settled rule of law that a party to an adverse proceeding such as this is entitled to be present during the direct testimony of a witness followed by the right to cross-examine such witness immediately after his direct examination, which procedure is an essential part of the common law and Constitutional concepts of a fair trial and of due process and equal protection of the law."

EXHIBIT G.

Rules of the Missouri Supreme Court.

(Vernon's Annotated Missouri Rules pp. 4-73.)

"4.10. ACQUIRING INTEREST IN LITIGATION.

"The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

"4.11. ABUSE OF CONFIDENCE AND DEALING WITH TRUST PROPERTY.

"The lawyer should refrain from any action whereby for his personal benefits or gain he abuses or takes advantage of the confidence reposed in him by his client. Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

"4.12. FIXING THE AMOUNT OF THE FEE.

"In agreeing upon or fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In agreeing upon or determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct

the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

"4.13. CONTINGENT FEES.

"Contingent fees are permitted and are subject to the provisions of Section 4.12 of this rule, which covers all fees, contingent or otherwise."

"4.28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It

is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred."

"4.31. RESPONSIBILITY FOR LITIGATION.

"No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what causes he will contest in courts for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."

"4.34. DIVISION OF FEES.

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

"4.42. EXPENSES.

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as matter of convenience, but subject to reimbursement."

"4.47. GENERAL RULE GOVERNING CERTAIN CONDUCT OF LAWYERS.

"A lawyer should always maintain his integrity; and shall not willfully commit any act against the interest of the public; nor shall he violate his duty to the courts or his clients; nor shall he, by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty or good morals; nor shall he be guilty of any other misconduct whereby, for the protection of the public and those charged with the administration of justice, he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney."

The exclusive machinery for the disbarment of attorneys is set up by Rule 5 of the Supreme Court of Missouri. *State ex rel. Chubb* v. *Sartorius*, 351 Mo. 1227, 175 S.W.2d 783, 786 (6).

The subsections of Rule 5 of the Supreme Court of Missouri deemed pertinent are as follows:

"5.01. CIRCUIT BAR COMMITTEES.

"There is hereby established in each Judicial Circuit a Bar Committee to be composed of not less than four lawyers who shall be appointed by this Court, one to serve for one year, one to serve for two years, one to serve three years and one to serve four years, and after each member's term expires his successors shall be appointed for a term of four years. Each

member shall take an oath that he will fairly and impartially, and to the best of his ability, administer Rules 4, 5 and 6."

"5.03. INVESTIGATIONS AND HEARINGS.

"The Committees shall have the power, with or without formal complaint, to investigate in a summary and informal manner, any matter of professional misconduct alleged to have been committed within its judicial circuit, or by a member of the Bar having his residence or office for the practice of law within its judicial circuit. If, upon any such investigation, a majority of the Committee finds that there is reasonable cause to believe that any member of the Bar under investigation is guilty of professional misconduct, it shall cause a formal hearing to be held upon notice to the accused, at which hearing the accused may be heard and may produce evidence to refute the charge. The Committee shall give reasonable notice to the accused by registered mail, addressed to his last known business or residence address of the substance of the complaint or charge, and of the time and place at which he may be formally heard. If, after such formal hearing, a majority of the Committee finds that there is probable cause to believe the accused is guilty of the misconduct charged, it shall file an information thereon in the Circuit Court of the county or city in which any act of alleged misconduct occurred or in which the accused resides or maintains an office for the practice of law; provided that by leave of court the information may be filed in the Supreme Court, or the Court of Appeals of the district in which any act of alleged misconduct occurred or in which the accused resides or has an office for the practice of law. Unless a majority of the Committee finds there is probable cause to believe the accused guilty of the misconduct charged, the charge shall be dismissed. In determining the truth of the charge the Committee shall consider only the evidence heard by it and made a part of the record at a formal

hearing or hearings touching the allegations of misconduct contained in the formal notice; provided further, that the record of informal investigations shall not be made a part of the record of the formal hearing, unless the accused is given an opportunity at the formal hearing to cross-examine all witnesses whose evidence is contained in the record of the informal hearing, and offered in evidence by the Committee at the formal hearing.

"In the conduct of any hearing whether upon formal notice or whether informal and for the purpose of investigation, the Committee shall have the right to compulsory process under the provisions of Section 5.04, of this rule; and the accused, upon being notified of formal hearing, shall also have the right to compulsory process provided for in Section 5.04 of this rule.

"The record of all investigations and formal or informal hearings shall not be made public, unless ordered by this Court, or the accused shall so request, or unless the Committee shall file an information thereon as provided herein."

"5.04. SUBPOENAS AND DEPOSITIONS.

"Upon application under the provisions of Section 5.03 of this rule, the Clerk of this Court shall issue writs of subpoena, including subpoena duces tecum and dedimus to take depositions. The Committees are empowered to take and transcribe the evidence of witnesses who shall be sworn by any member thereof, and the Committee shall report to this Court the failure of any person to attend and testify in response to any subpoena issued as herein provided."

"5.05. FORM OF INFORMATION.

"The information mentioned herein shall be styled 'In Re: (Name of Accused)' and shall set forth in brief form the specific act or acts of misconduct

charged, and shall be signed by the Chairman and Secretary, or by a majority of the members of the Committee. Any number of acts may be charged in the same information, but shall be separately stated."

"5.06. SUMMONS, PROSECUTORS AND COUNSEL.

"Upon the filing of an information a copy thereof shall be served on the accused, together with a summons served as ordinary writs of summons requiring him to plead thereto within ten days. The Committee, or one or more members thereof designated by the Committee, shall become the prosecutors, and shall present evidence in support thereof, and prosecute the matter to final determination, unless the General Chairman or a majority of the Advisory Committee shall designate counsel for the purpose of prosecuting the case, in which event the counsel so designated shall prosecute the case with the aid and assistance of the Circuit Bar Committee."

"5.08. PROCEDURE OF COMMITTEES UPON FORMAL HEARING.

* * *

"(f) Hearings: The Clerk of the Supreme Court of Missouri will upon request, issue subpoenas for witnesses, either for the Committee or on behalf of the accused.

"The hearing shall be upon the date fixed in the notice or at such later date to which the same shall be adjourned or continued by the Committee.

"All hearings shall be in accordance with the Rules of the Supreme Court of Missouri.

"The testimony at all hearings shall be taken in shorthand and transcribed.

"At the conclusion of any hearing and after the Committee shall have finally disposed of the matter,

the complete record of such proceedings before the Committee, including the notice, subpoenas, and transcript of the evidence, together with the order of the Committee disposing of the matter shall be filed with the Clerk of the Supreme Court of Missouri.

"Neither unwillingness or neglect of a complainant to prosecute the charges, nor settlement, compromise or restitution, shall, in itself, justify the Committee in failing to undertake or complete its investigation and findings."

"5.09. MEMBERS OF COMMITTEE MAY TAKE TESTIMONY.

"Where any Committee has any matter under investigation within its jurisdiction any member of such Committee may, upon order of the Committee, take testimony of any witness or witnesses prior to formal hearing provided that such evidence shall be reduced to writing and submitted to the Committee."

"5.10. TRIAL AND DISPOSITION OF CAUSES.

"Upon the filing of an answer or after the lapse of ten days after service of summons, if no pleading be filed, the Court shall proceed to try the cause, and all proceedings shall be summary without a jury and conform, as nearly as may be, to proceedings for extraordinary legal remedies, always saving to each side a reasonable opportunity to present evidence according to the rules and principles of the law of evidence applicable to civil proceedings, and to be heard thereon. If the Court finds for the accused, it shall dismiss the complaint. If the finding be that the charges are true the Court shall render a judgment finding the accused guilty, and shall either reprimand the accused or suspend him from practice for a time fixed in the discretion of the Court, or permanently disbar him, as shall to the Court seem proper. Costs shall be taxed as the Court, in its discretion, may order. When any

Circuit Court shall make any order of disbarment or suspension as above provided, the Court shall promptly thereafter transmit to the Clerks of the Courts of Appeals and to the Clerk of the Supreme Court a certified copy of such order."

"5.12 REPRESENTATION OF THE BAR.

"In addition to the duties above imposed, the Committee in each circuit shall be constituted as representatives of the Bar of this Court, with full power to do all things which the Bar, as a class, may do to advance the standards and prestige of the Bar; and shall make inquiry from time to time as to the unlawful practice of law by persons not licensed to do so, and where, in the opinion of the majority of the Committee, the facts justify it, to institute and prosecute, as representatives of the Bar, such actions as may be appropriate to suppress such unlawful practice."

"5.13 GENERAL CHAIRMAN OF BAR COMMITTEES.

"For the purpose of administering this rule and the Bar Fund, there is hereby created the office of General Chairman of Bar Committees, who shall have general supervision of the Bar Committees in each judicial circuit. The General Chairman of the Bar Committees shall be appointed by this Court for a term of four years, and the Clerk of this Court shall act as treasurer. The General Chairman shall take an oath that he will fairly and impartially and to the best of his ability administer Rules 4, 5 and 6."

"5.14 THE ADVISORY COMMITTEE.

"There is hereby established a committee to be composed of the General Chairman and four lawyers, who shall be appointed by the General Chairman, subject to the approval of this Court. One of the four lawyers is to serve for one year, one to serve for two years, one to serve for three years and one to serve for four years, and after each member's term expires

his successor shall be appointed for a term of four years. This Committee shall be termed 'The Advisory Committee.' Each member shall take an oath that he will fairly and impartially and to the best of his ability administer Rules 4, 5 and 6. The General Chairman of the Bar Committees shall be ex officio Chairman of the Advisory Committee."

"5.16 OPINIONS AND RULES BY ADVISORY COMMITTEE.

"The Advisory Committee shall give opinions as to the interpretation of Rules numbered 4, 5 and 6 and the amendments or additions thereto, and shall make rules and regulations not inconsistent therewith for the administration of this rule."

"5.17 ADVISORY COMMITTEE MAY ACT IN LIEU OF CIRCUIT BAR COMMITTEES IN CERTAIN CASES.

"The Advisory Committee shall sit with full powers thereof in lieu of the Circuit Bar Committee of any circuit in any particular case or cases: (a) when requested by the General Chairman of Bar Committees or ordered by a majority of the Advisory Committee; (b) when requested by a mapority of the Circuit Bar Committee; (c) when requested by the accused and so ordered by the General Chairman or by a majority of the Advisory Committee; or (d) when the charges preferred or to be investigated are against a member of the Circuit Bar Committee. Three members of the Advisory Committee or two members of the Advisory Committee and the General Chairman, shall constitute a quorum. Any action may be taken by the Advisory Committee upon an affirmative vote of three members thereof or two members of the Advisory Committee and the General Chairman. In the conduct of investigations and of hearings the Advisory Committee shall follow the procedure prescribed in this rule for Circuit Bar Committees except that the jurisdiction of the Advisory Committee shall extend to all

judicial circuits in the State, and except also that the venue provisions of Section 5.08 of this rule shall not apply, and the Advisory Committee shall have the right to conduct formal hearings at any designated place in the State. When the Advisory Committee shall sit, the notice shall be signed by the General Chairman or by any member of the Advisory Committee on order of a majority of the members of the Committee and be directed to the accused and require him or her to answer the complaint on the date therein stated. The notice shall be served by registered mail. The notice to the accused may be substantially in the form used by the Circuit Bar Committees by inserting 'Before the Advisory Committee of the State of Missouri,' in lieu of 'Before the Circuit Bar Committee of the * * * Judicial Circuit.' "

"5.18 ADVISORY COMMITTEE MAY TAKE NECESSARY ACTION FOR THE PREVENTION OF UNAUTHORIZED PRACTICE OF LAW AND OTHER ENFORCEMENT OF THESE DISCIPLINARY RULES.

"The Advisory Committee shall have the power and is charged with the duty, on behalf of the Bar of this State, of investigating the unauthorized practice of law and of instituting and prosecuting appropriate suits, actions or proceedings against any parties and in any forums within or without the State of Missouri, for the purpose of protecting the integrity of the Bar of this State, of enforcing this rule, of safeguarding the personal relationship of attorney and client and restraining and suppressing intermediary agencies as defined in this rule, or prohibiting the solicitation for or the improper parceling out of law practice to any member of the Bar of this State, and of preventing the unauthorized practice of law and of other practices tending to defeat or hamper the administration of this rule or to injure the members of the Bar of this State in the lawful practice of their profession; and to such end the Advisory Committee is

constituted the authorized legal representative of the Bar of this State and shall have authority to act in the premises as fully and as effectively as though the proceedings were taken in the name of all the members of the Bar of this State."

"5.19 EMPLOYMENT OF INVESTIGATORS, COUNSEL AND CLERICAL ASSISTANTS.

"The General Chairman of Bar Committees is authorized to appoint, subject to the approval of a majority of the Advisory Committee and various Bar Committees for the purpose of aiding in the enforcement of Rules 4, 5 and 6 of this Court; and he is authorized subject to the approval of a majority of the Advisory Committee to appoint or employ special counsel to prosecute any information, complaint or proceeding instituted or pending before any Committee or any Court. He is further authorized to employ a secretary; and to employ such clerical assistants as may be deemed necessary by the Advisory Committee and to discharge the same. The compensation or salaries of all such appointees and employees, so employed, shall be fixed by order made by a majority of the Advisory Committee.

"For the purpose of the administration of Rules 4, 5 and 6 of this Court the Advisory Committee is authorized to maintain and operate an office located in the central part of this State and reasonably accessible to members of the Bar of Missouri. The location of such office shall be designated by the General Chairman with the approval of a majority of the Advisory Committee. The necessary cost of the operation and maintenance of said office shall be approved by a majority of the Advisory Committee and paid out of the Bar Fund."

"5.20 RECORDS OF FORMAL PROCEEDINGS.

"The records and proceedings in any formal hearings before any Circuit Bar Committee or Advisory

Committee shall, upon disposition of the complaint, be filed with the Clerk of this Court. The record of said proceedings when thus filed, shall not be subject to public inspection, unless an information be filed thereon or unless ordered by this Court, or the accused shall so request, but may be inspected only by members of said Bar Committees, or the person complained against, or his duly authorized representative.

"5.21 SERVICE WITHOUT COMPENSATION, TENURE.

"The members of the Advisory Committee, except the General Chairman, and the members of the various Circuit Bar Committees shall serve without compensation and until their successors are appointed and qualified."

"5.22 GENERAL CHAIRMAN SHALL DEVOTE FULL TIME, COMPENSATION.

"The General Chairman shall devote his full time to the duties of his office and shall not engage, either directly or indirectly, in the practice of the law, except in the general fulfillment of his official duties. He shall serve for a term of four (4) years and until his successor is appointed and qualified. The General Chairman shall receive as compensation for his services an annual salary in such sum as may be fixed by order entered of record by the Supreme Court, said salary to be payable in monthly installments."

Rule 6 of the Missouri Supreme Court provides in part:

"6.01. ANNUAL ENROLLMENT FEE:

"Each person licensed to practice in this state shall pay for the 'Bar Fund' the sum of $6.00 and for the Missouri Bar the sum of $16.50, or a total enrollment fee of $22.50, on or before January 20 of each year, with the following exceptions: Persons licensed less than three years shall, during such period, pay for such funds, respectively, the sums of $5.00 and $10.00

annually, or a total annual enrollment fee of $15.00. Persons admitted to the bar for the first time in this state, except those admitted under Rule 8.091 shall not be required to pay any enrollment fee until the 20th of January next following their admission to the bar. Persons in the armed forces shall be exempt from paying an enrollment fee until the 20th of January next following their return to civilian life. Persons licensed to practice in this state for fifty years or more, or who have reached the age of 75 years, shall be excused from the further payment of annual enrollment fees upon making a written application to the Advisory Committee showing such fact. Persons licensed but who neither reside, nor practice, nor are employed in this state, shall be exempt from paying an enrollment fee. The enrollment fee shall be paid to the circuit clerk of the county wherein the person maintains an office, or is employed, or resides. The clerk shall give each person who pays an enrollment fee a receipt for such fee, which shall be evidence of his good standing. (As amended Oct. 14, 1947; Oct. 12, 1953, effective Jan. 1, 1954; Nov. 13, 1956, effective Jan. 1, 1957.)"

"1 Probably should read '8.10'."

"6.05. DISBURSEMENT OF BAR FUND

"To provide an initial capital for the Missouri Bar the sum of $2,500.00 shall be transferred by the Clerk of this Court from the Bar Fund together with such funds as may be transferred to the Missouri Bar by the present Missouri Bar Association; and sum of $2,500.00 to be repaid to the Bar Fund on or before March 1, 1945.

"Hereafter, such part of the enrollment fee allocated to the Missouri Bar shall be promptly deposited by the Clerk of this Court to a separate account in the name of 'Missouri Bar.' The compensation allowed for collection of the enrollment fee shall be borne equally.

"By agreement between the Advisory Committee and the Board of Governors of the Missouri Bar, and with the approval of this Court, further funds may from time to time be transferred from the 'Bar Fund' to the separate account of the Missouri Bar, or vice versa.

"Payments from the funds of the Missouri Bar shall be paid by the Clerk of this Court upon a warrant therefor drawn in such a manner as may from time to time be determined and directed by the Board of Governors of the Missouri Bar.

"All other payments from the 'Bar Fund' shall be made by the Clerk of this Court upon a warrant therefor, but only in the following manner and solely for the following purposes, and none others.

"(a) For costs taxed against a Circuit Bar Committee or Advisory Committee in any proceedings had under this rule, provided, however, that no costs shall be allowed for a Circuit Bar Committee unless written authority for instituting the proceedings shall first have been obtained from the General Chairman or a majority of the members of the Advisory Committee.

"(b) For expenses of investigating complaints, taking of testimony and preparing and prosecuting of complaints, provided, however, that no such expenses shall be allowed to any Circuit Bar Committee unless written authority for incurring said expenses shall first have been obtained from the General Chairman or a majority of the members of the Advisory Committee.

"(c) For salaries, fees and expenses of special representatives, counsel and all appointees employed under the provisions of this rule.

"(d) For expenses of the Circuit Bar Committees, Advisory Committee, and General Chairman incurred under this rule.

"(e) For any expense authorized by order of the Supreme Court.

"(f) Payments shall be made by the Clerk of this Court as follows: (1) For expenses of any Circuit Bar Committee, on warrants signed by the Chairman and attested by the Secretary thereof; (2) for other expenses incurred under this rule on warrants signed by the General Chairman only. All warrants must be signed or counter-signed by the General Chairman."

Office-Supreme Court, U.S.
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OCT 11 1961
JAMES R. BROWNING, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 398.

C. A. RANDOLPH,
Petitioner,

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 398.

C. A. RANDOLPH,
Petitioner,

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

FOREWORD.

The petition here before the Court seeks review of the challenged decision of the Supreme Court of Missouri ordering disbarment of petitioner for misconduct respecting solicitation and fee splitting with laymen.

The case was an original proceeding brought directly in the Supreme Court and tried to a conclusion by that

Court, *en banc*. The Court, by its opinion, ordered petitioner disbarred.* (Pet. A18-A59) Respondent "The Advisory Committee" is composed of a General Chairman and four lawyers, and such Committee was created pursuant to Missouri Supreme Court Rule 5 promulgated in 1934. (Pet. A89-A99) The Advisory Committee is charged with the duty of investigating professional misconduct of lawyers in violation of the rules of Court or otherwise, and the initiation and prosecution of cases in Court if the Committee determines there is probable cause to do so. On the petition here before this Court, respondents are the members of "The Advisory Committee" who acting as such filed the information respecting the alleged misconduct of petitioner in the Supreme Court of Missouri. (Pet. p. A1)

OPINION BELOW.

The opinion below is *In re C. A. Randolph*, 347 S.W.2d 91, Exhibit B of Petitioner's petition, pp. A18 to A59.

QUESTIONS PRESENTED.

The petition filed herein presents no real or substantial question respecting any constitutional rights of petitioner. It appears from the petition that petitioner was disbarred by the highest court of the State of Missouri, the Supreme Court, sitting *en banc*, on information filed, notice given, appearance and answer filed. There fol-

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*Respondent, The Advisory Committee, adopts the method employed by petitioner with respect to references to the printed Commissioner's report and the 11 typewritten transcripts and 2 books containing the record of the case before the Supreme Court of Missouri. The Commissioner's report will be cited "Comm. Rep.", and the transcript cited as "Tr. Vol. , p. ", and petitioner's petition as "Pet. p. ."

lowed a protracted trial before a Special Commissioner of the Supreme Court involving ten hearings extending over 17-1/2 months, during which three thousand and fifty (3,050) pages of testimony were taken on behalf of informants and petitioner, and five hundred and seventy-seven (577) exhibits offered by informants and petitioner and received in evidence. Petitioner was accorded both substantive and procedural due process of law.

STATEMENT.

In this case by the judgment, review of which is sought, petitioner was disbarred by the Supreme Court of Missouri for what may be succinctly characterized as solicitation and splitting fees with laymen. (Opinion, Pet. pp. A57, A58, A59) This judgment was rendered in an original proceeding in the Supreme Court of Missouri, brought by information filed by respondent, The Advisory Committee. This information was not filed until the investigating procedure provided for by Rule 5 had been complied with. This procedure included formal hearings on charges pursuant to Supreme Court Rule 5, at which petitioner appeared in person and by counsel and testified and offered evidence. The respondent, The Advisory Committee, unanimously determined that there was probable cause to believe the petitioner guilty of professional misconduct such as to warrant the institution of a disciplinary proceeding. (Pet. Exhibit A. pp. A1, A2) On October 22, 1956, the information as set out at page A1 of petitioner's petition was filed by the respondent Advisory Committee in the Supreme Court of Missouri. On October 25, 1956, William G. Boatright entered his appearance as counsel for petitioner, and on October 31, 1956, there was filed in the Supreme Court an offer to

submit the case on the record of the formal hearings of the Advisory Committee, which offer was by the Supreme Court declined. On November 23, 1956, an answer was filed denying the charges of the information, and on February 26, 1957, Mr. Walter A. Raymond entered his appearance as additional counsel for petitioner. Thereafter, on March 13, 1957, Robert V. Niedner was appointed Special Commissioner by the Supreme Court "to hold pre-trial conferences, subpoena witnesses and records, hear evidence; compel the attendance of witnesses and the production of books, papers and documents; to issue attachments therefor; to hear and determine all objections to testimony in the same manner and to the same extent as this Court might, in the trial of the cause before the Court; and to report the evidence taken, together with your findings of fact and conclusions of law." (Comm. Rep. pp. 2, 3)

The Special Commissioner held two pre-trial conferences in Kansas City, Missouri, the first on April 12, 1957, and the second on November 8, 1957. At these conferences it was agreed by the parties and the Special Commissioner that the exhibits in evidence before the Advisory Committee would be admitted in evidence by the Commissioner; that photostatic copies of records of the Commerce Trust Company were true copies and that a handwriting expert, if called as a witness, would testify in accordance with his report. (Comm. Rep. p. 3)

Thereafter the Special Commissioner conducted ten hearings in Kansas City, Missouri, same being held on December 12 and 13, 1957, January 28, 29 and 30, February 20, March 20 and 21, May 15 and 16, June 19 and 20, and July 21, 22 and 23, 1958, April 2, April 21 and 22, and May 28 and 29, 1959, during which 3,050 pages of testimony were taken and 577 exhibits, ranging from single sheet

memoranda to lengthy depositions, were received in evidence. (Comm. Rep. p. 4) During the hearings, by stipulation, petitioner and his counsel agreed that the testimony of four witnesses taken before the Advisory Committee and offered in evidence at the formal hearing before the Advisory Committee, at which time the witnesses were cross-examined by counsel for petitioner, could be admitted in evidence before the Commissioner in like manner as a deposition, the petitioner insisting that the cross-examination conducted by his counsel be a part thereof. (See Respondent's Appendix I)

On July 15, 1960, the Commissioner filed his report comprising 208 printed pages with the Clerk of the Supreme Court of Missouri. Thereafter, on the complete record of the evidence taken and on briefs submitted by the Advisory Committee, as informants, and the petitioner, the cause was argued orally before the Supreme Court of Missouri sitting *en banc*. After due consideration the Court rendered its opinion ordering the disbarment of petitioner. (Petition, Exhibit B, pp. A18 to A59 inclusive) Petitioner filed a motion for a judgment of acquittal or for a re-hearing, which was duly considered by the Court and denied June 12, 1961. (Petitioner's Petition, Exhibit C, pp. A60-A65)

ARGUMENT.

I. Due Process and Rule 5.03.

Petitioner contends that rule 5.03 of the Missouri Supreme Court does not provide due process of law to any accused attorney. This rule is set out verbatim in appendix to the Petition. (Pet. pp. A90-91) He admits this rule has governed procedure in disciplinary matters in Missouri for thirty years. (Pet. p. 24)

On October 22, 1956 (See Comm. Rep. pp. 9-11 for chronology of this and succeeding dates), the Advisory Committee (Respondents here—Informants below) filed Information direct in the Supreme Court of Missouri. This Information is set out verbatim with the Petition. (Pet. pp. A1-18) The first requirement of due process is that the accused have written formal apprisal of the charges against him. The accused here does not contend no notice.

What we must remember is that this case started on October 22, 1956, when this information was filed in the Supreme Court of Missouri; and that the investigation of the Advisory Committee under rule 5.03 prior to the filing of the information could not possibly deny the accused due process except and unless evidence taken by the Advisory Committee in its formal or informal hearings incident to determination only of reasonable or probable cause was used against the accused over his objection and where he had not been given the right to confront and cross-examine such witnesses.

It is apparent that in reality rule 5 of the Supreme Court of Missouri augments rather than denies due process to an accused attorney. It is apparent from reading Rule 5 that the Advisory Committee carries out a similar function to that of a Grand Jury in a criminal case. As stated by the Missouri Supreme Court in *In re Connor*, 357 Mo. 270, 207 S.W.2d 492 (cited with approval by Petitioner), the first duty of the Committee is investigation. That is also the primary duty of a grand jury. But the grand jury can return an indictment and bring the accused into open court (1) without giving the accused any written or formal notice of the charges against him, (2) without giving the accused any right to defend or introduce evidence on the issue of probable or reasonable cause to prevent indictment, (3) without giving the accused any right

to confront and cross-examine his accusers or any adverse witness at the grand jury level. All three of these rights are granted to an accused attorney under rule 5.03 so that he is afforded far more due process than in a criminal case.

These are the rights granted an accused attorney in any disciplinary action in Missouri. These rights were granted to the accused in this case. Petitioner now complains that he was denied due process in this case because the testimony of four witnesses (Jarboe, Smith, Carignan, and Tuggle) was taken at formal hearing before the Advisory Committee prior to the filing of the information in this case (yet it is conceded that in each and every case the Petitioner confronted and cross-examined the witness) and that in each case the testimony of the witness was admitted not only without objection but With the Express Consent and Stipulation of the Petitioner. The Petitioner admits this (Pet. p. 97) (merely saying he would not have so stipulated had he known how the Court was going to construe the testimony). In order that there be no question in this regard the verbatim record is set out in Respondent's Appendix I.

The Petitioner contends (with repetition) due process was denied because all investigations at the committee level under rule 5.03 are and were confidential (the same as a grand jury proceeding) until probable cause has been voted and a case filed. Secrecy (before probable cause is voted) is for the protection of the accused attorney. Petitioner's reasoning would invalidate any criminal indictment by a grand jury whose proceedings are always secret.

Continuing with the chronology of the record: On October 22 (the day the information was filed) the Petitioner filed a motion (orally argued by his attorney Wm.

G. Boatright, now deceased) before the Supreme Court *en banc* to withhold the record from the public and hold secret hearings. This was denied by the court. There was not a single secret hearing after this case was filed in the Supreme Court of Missouri.

Petitioner contends throughout his petition that the hearing before the committee was biased, prejudiced and unfair and the evidence improperly obtained (he says he even complained to the Supreme Court prior to the filing of this case on October 22) yet on October 30, eight days after the Information was filed, Petitioner filed offer in writing with the Supreme Court of Missouri "to submit the case on transcript of hearings before Advisory Committee." (Comm. Rep. p. 9) This offer was refused by the Court which required full hearings and no evidence was adduced without the express ruling as to admissibility thereof by the Court's Commissioner. The Petitioner here does not raise a single question that evidence was improperly admitted —the contention is that petitioner was denied due process because the Court did not draw the inferences therefrom Petitioner desired (he says so in so many words at page 97 of the Petition).

In his Appendix, Petitioner sets out verbatim the Information filed on October 22. The record (Comm. Rep. p. 10) shows Petitioner filed answer to the charges on November 23. The Petitioner did not see fit to set out his own answer in his Appendix. Respondents have therefore requested the Clerk of the Supreme Court of Missouri to forward a certified copy of this answer to be added to the record already forwarded to the Clerk of this Court. This answer is significant because: (1) it did not raise a single constitutional question, state or Federal (2) it did not raise or put in issue a single question as to the constitutionality of Rule 5 or any constitutional question, especially as to

due process now raised in this Petition. There was no motion to quash the information and the Record does not show objection by Petitioner to any evidence on a constitutional or Federal question. The Appendix to the petition shows on its face the Petitioner did not attempt to raise any such questions until in briefs filed after the evidence was in and the case decided. We conclude no constitutional question was ever timely raised, but again respondent emphasizes that no constitutional right of Petitioner was in fact ever denied.

II. Impeachment Testimony—Only Considered As Such.

Petitioner contends (Pet. p. 7—par. 6(d) and 97) that the Missouri Supreme Court "ignored and refused to follow the rules of evidence" and accepted "as substantive proof testimony of Feezer relative to statement to him out of Court and not under oath of witness Mears, and similar testimony of Barrick of similar statements made to him under similar circumstances by witnesses Beck and Goodner whose testimony was admitted only for the limited purpose of impeachment."

It is agreed that the testimony of Feezer and Barrick (who interviewed some of Petitioner's clients for Missouri Bar) was admitted only for impeachment after foundation had been laid wherein these clients denied making such contradictory statements. In Missouri the report of the Special Commissioners is advisory only. (*In re Parkinson*, 128 S.W.2d 1023) The petition for the writ at bar is necessarily directed to the opinion of the Missouri Supreme Court (*In re C. A. Randolph*, 347 S.W.2d 91) which is set out verbatim in Petitioner's Appendix (Pet. pp. A18-59)—not to the Commissioner's findings which were advisory only.

In concise answer to this point it is respectfully submitted that the only part of this Missouri Supreme Court Opinion in any way relating to contradictory statements of Petitioner's clients to any representative of the Missouri Bar is found in Appendix to petition (Pet. pp. A53-A55) where the Opinion of the Missouri Court specifically restricts its consideration of such statements to impeachment —the limited purpose for which offered. The Supreme Court Opinion did not even consider or refer to any testimony of Mr. Feezer as the Petitioner indicates. A careful reading of the Opinion will show conclusively that the Supreme Court of Missouri never accepted as substantive proof any evidence admitted for the limited purpose of impeachment.

III. Quantum of Proof.

At page 117 the Petition for Writ herein contends in substance that the Tuggle, Carignan and Deason testimony summarized in the Opinion "were by the Court selected as the strongest cases to support the result reached."

Although the opinion shows strong direct testimony of these witnesses proving both solicitation and division of fees it is inaccurate to imply, as the Petition clearly does that the Opinion was based on the testimony in these three cases. In fact the Opinion clearly states (Pet. p. A30) that the testimony of these witnesses was set out in the Opinion to show that the constantly repeated statements of Petitioner in his briefs below that "no client (except Hice) gave any direct evidence of solicitation and division of fees" simply was not true. The court quoted from the record to expose the untruth.

It is not the intent—and surely not the duty of the Respondent here, the Advisory Committee, to review an

eleven volume record. However, because of Petitioner's assertion that the Opinion was based on the testimony of these three witnesses we would point out the undisputed proof in the Hice case was that Fenn drove Hice from Clovis, N.M., to Petitioner's office in Kansas City in Fenn's Cadillac automobile on the date Hice signed a 40% contingent fee employment contract with Petitioner and that Fenn received a cashier's check the date of the Hice settlement amounting to the odd penny to one half of Petitioner's fee; that Fenn received Cashier's checks amounting exactly to one half of Petitioner's fee in seventeen other Santa Fe Cases; that the so-called employment letter in the Taylor case was in Fenn's handwriting; that C. C. Jennings transported Pauline Brown (now Mayhon) from New Mexico to Kansas City in his automobile on the date she signed a 50% contingent fee contract with Petitioner and that Jennings received a cashier's check from the proceeds of the Brown or Mayhon settlement amounting to the odd penny of one half the amount of Petitioner's Attorney fee; that O. C. Brown transported Mrs. Jarboe to McDonald's office in Minneapolis in his Cadillac automobile and then direct to Petitioner's office in Kansas City the day she signed a 50% contingent fee contract with Petitioner and that Brown received a cashier's check from the Jarboe settlement in an amount exactly equal to one half the amount of Petitioner's attorney fee; and of clear solicitation by Fenn of the Spriggs case as hereinafter set out. Thus, it is inaccurate to say that the Opinion was based on the testimony of three witnesses. But more important the question of quantum of proof is not a matter for this Court's consideration as will be more fully covered in this brief. (Tr. 626, 965-973, 1153, 1617, 2564-74; Comm. Rep. 59, 66, 74, 84, 153.)

IV. Omissions and Inaccuracy—The Spriggs Case.

The Petition for the Writ herein (Pet. pp. 63-66) discusses the Spriggs case. We reply to this discussion briefly here as illustrative of omissions and inaccuracy indulged in by petitioner in summarizing evidence from the record.

Petitioner's summary though lengthy omitted to state: (1) that Spriggs, a Santa Fe employee, was killed several hundred miles from Clovis, New Mexico, at four o'clock in the afternoon of August 22, 1949; (2) that Fenn (whom the Court found to have been a solicitor for both McDonald and Petitioner) was at the Spriggs home in Clovis the evening of August 22, 1949, discussing employment of petitioner to sue the Railroad with the 18 year old widow of the deceased and her mother; (3) that on August 23, 1949, Fenn filled out (in his handwriting) contingent contract employing petitioner to prosecute the death claim against the Santa Fe which contract he promptly mailed to petitioner in Kansas City; (4) that at the time said contract was signed (within 24 hours of the death) Fenn was exhibiting to the Spriggs photostats of substantial settlement drafts McDonald had gotten in other F.E.L.A. cases; (5) that on August 29th, the Spriggs widow wrote Petitioner requesting release from the employment contract; (6) that on August 30th Petitioner wrote the Spriggs people in words and figures "You may, thereafter, disregard my *previous* employment in this case." (Emphasis ours) (Comm. Rep. pp. 7, 59, 87, 88) (R. Exs. 1-4 and pp. 2008-15) Petitioner's statement to this court (Pet. 65) that he "had no notion of accepting the contract" would be inaccurate in view of his own letter of August 30th advising the Spriggs to disregard his *previous* employment.

V. The Law Pertaining to Due Process and Sufficiency of Proof.

Lest the facts be lost in the voluminous contentions of petitioner, this is not a case decided on appeal to the Supreme Court of Missouri, nor a case decided by an administrative tribunal, Board or Committee, which the Court merely reviewed; this case was tried by the Supreme Court of Missouri, in the exercise of its original jurisdiction, as any ordinary trial would be conducted. Evidence was heard by the Court, through its Special Commissioner appointed by the Court to take evidence and report the same to the Court with findings of fact and declarations of law. In Missouri reports of Special Commissioners are advisory only. (*In re Parkinson*, 128 S.W.2d 1023, l.c. 1037) Briefs were filed and the cause argued before the Court, *en banc*, on the merits, on the pleadings and evidence. The Court then rendered its decision in its judicial capacity as the highest constitutional Court of Missouri and again considered the case on petitioner's motion for rehearing or judgment of acquittal.

This Court has said, respecting due process (*Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, l.c. 170), that:

> "It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

This Court, in *Cohen* v. *Hurley*, U.S. , 6 L. Ed. 2d 156, 81 S. Ct. , has recently reaffirmed the established rule of law with respect to the inherent power of the courts to exercise disciplinary powers over members of the Bar. This Court said, 6 L. Ed. 2d l.c. 162:

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exercise of disciplinary powers which English and American Courts (the former primarily through the inns of Court) have for centuries possessed over members of the Bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long established, but the subject matter of the present investigation does not lack a rational basis."

The Cohen case involved failure of a lawyer to cooperate in an investigation respecting solicitation.

It can no longer be doubted under the decision of this Court in *Lathrop* v. *Donohue*, U.S. , 6 L. Ed. 2d 1191, 81 S. Ct. , that the highest courts of the States have inherent power to promulgate rules with respect to the integration of the Bar, including procedures for the initiation of disciplinary proceedings provided the Court retains its traditional power with respect to discipline or disbarment of any member of the Bar. It was specifically noted in the Lathrop case that under the rules adopted by the Supreme Court of Wisconsin, the Supreme Court reserved the power with respect to disciplinary matters. Rule 5 of the Supreme Court of Missouri likewise reserves to it the judicial power to discipline or disbar members of the Bar. This Court specifically noted in Cohen that "A state can constitutionally afford a different procedure —the present procedure—in these judicial investigations from that in criminal prosecutions." (6 L. Ed. 2d l.c. 166) The foregoing authorities fully establish that Rules 4 and 5 promulgated by the Supreme Court of Missouri provide for procedural due process with respect to disciplinary proceedings.

As was noted by this Court in the Cohen case, the principles applicable in denial of admission to the Bar are equally applicable in proceedings for disbarment, so that the constitutional questions decided in the cases of *In re George Anastaplo, Petitioner,* ... U.S. ..., 6 L. Ed. 2d 135, 81 S. Ct. ..., and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722, and *Konigsberg* v. *State Bar of California,* U.S. ..., 6 L. Ed. 2d 105, 81 S. Ct. ..., are applicable with respect to disciplinary cases. In the first Konigsberg case this Court, after reviewing the record, held that the State determination was without rational support in the evidence, and therefore offensive to the due process clause of the 14th Amendment. The case was remanded for further proceedings. In the second Konigsberg case, the judgment of the Supreme Court of California was affirmed, it having denied Konigsberg admission to the Bar for the reason that his refusal to answer questions obstructed the State of California in determining his qualifications for admission. Petitioner here relies on the first Konigsberg case, and seeks the review of this Court of the evidence before the Supreme Court of Missouri, and found by it to be a sufficient basis for its decision of disbarment. This Court made it abundantly clear in the second Konigsberg case that the ruling of the highest Court of California respecting admission to the Bar related to a matter of exclusive State concern, and absent a deprivation of due process by failure to accord fundamental fairness in the proceedings would not be subject to review by this Court. Again in the *Anastaplo* case, the principle was reiterated, this Court saying, 6 L. Ed. 2d, l.c. 144:

> "We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were

> another State Court of Review, still less to express any view upon the wisdom of the State's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its Bar offends the Federal Constitution."

The applicable rule was again stated by this Court in *Milk Wagon Driver's Union of Chicago, Local 753 et al.*, v. *Meadow Moor Dairies, Inc.*, 312 U.S. 287. 61 S. Ct. 552, 85 L. Ed. 836, l.c. 841, in this language:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings, but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here involved. The place to resolve conflicts in testimony and in its interpretation was in the Illinois Courts and not here. To substitute our judgment for that of the State Court is to transcend the limits of our authority."

In the Cohen, Konigsberg and Anastaplo cases the dissenting justices expressed concern that the majority opinions validated action taken based on refusal to answer inquiries on constitutional grounds rather than by employment of ordinary investigation and prosecutional processes and a hearing which unquestionably met all the tests of due process.

With prophetic wisdom Rule 5 of the Missouri Supreme Court requires all disciplinary proceedings to be filed and tried in Court. Thus the petition here does not involve a case where petitioner failed to answer questions on constitutional grounds or one where "short shrift" treatment was accorded petitioner.

VI. Rule 23(c) and 23(e).

Because the Petition for the Writ herein repeatedly casts reflection on the fairness and integrity of the Supreme Court of Missouri (Pet. pp. 28, 5, 6, 9, 76, 97) the Advisory Committee and its Counsel (Pet. 28, 37, 77) Respondents in reply have endeavored to fairly meet the Constitutional Questions mentioned regardless of whether properly raised under the rules of this court. We would respectfully point out to the Court here that if we are to have any orderly processes in Petitions for Writs of this kind there should be some accountability for compliance with the Court's rules, and that the Petition for this writ does not comply with either Rule 23(c) or Rule 23(e), which requires that questions for review here be presented without unnecessary detail and by a concise statement of facts. Not only does the Petition attempt to retry this whole case on the merits it even sets out a detailed list of all of the character witnesses in the case headed by a distinguished Missourian who now sits on this Court. In this regard the Court may surely take Judicial Notice of the mutual respect and affection that would necessarily characterize his relations with his own Supreme Court of Missouri and the members of the Advisory Committee; and with the Court's Special Commissioner and the Chief Counsel for the Advisory Committee who served with him on the Board of Governors of the Missouri Bar. The only logical conclusion to be reached is that the proof of Petitioner's guilt had to be all the more conclusive because of the character testimony in the case. The important point is the lengthy identity of the character witnesses has no material bearing on any legitimate Constitutional Question and is in violation of Rule 23(c) and (e).

The voluminous transcript of the evidence on file in this Court will disclose upon a casual examination that the petitioner was accorded full due process of law and in

nowise deprived of any of his constitutional rights. The kind and character of judicial proceedings conducted with respect to the petitioner in this case meets all of the requirements of both the majority and dissenting opinions in the cases to which we have alluded. Petitioner's counsel cross-examined every witness with respect to which petitioner now claims he was denied the right of confrontation. The record shows petitioner at the trial joined in the introduction of the testimony of such witness. Petitioner's other contentions relate to the sufficiency and substantiality of the record and to the contention that the Court did not believe some parol evidence offered by petitioner. These questions are not open for this Court's consideration save in the rare case such as the first Konigsberg case where the determination could be found to be "without rational support in the evidence." No such case is presented here.

CONCLUSION.

Petitioner seeks to cast his constitutional claims which were never timely raised within the ambit of the recent cases decided by this Court respecting admission and discipline of members of the Bar. None of these decisions relate to a fact situation where, as here, there was involved a trial by the highest Court of the State in accordance with traditional judicial proceedings.

The petition fails to comply with rules 23 (c) and 23 (e).

It is respectfully submitted that the petition should be denied.

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Albany, Missouri,
Attorneys for Respondent, The Advisory Committee.

APPENDIX I—RESPONDENT'S REPLY.

The purpose of this appendix is to set out verbatim that part of record pertaining to the admission of the testimony of four witnesses pursuant to agreement and stipulation of the parties:

From Vol. 1, pp. 4-5:

Mr. Thompson: Now it is my understanding from my consultations with Mr. Boatright, the respondent and his counsel, that as to Mrs. Coy Foster, Glen V. Thompson, Lloyd Connor, David E. Clark, Raymond B. Wade, Ira Gaskin, Edna Ruth Meyer or Edna Ruth Jarboe, O. C. Brown, James R. Smith, Martin Carignan, Francis Tuggle, Norman Fenn and J. P. Hice that counsel have agreed that such testimony where there was a right of cross-examination[1] may be considered without objection, with the exception, Mr. Boatright you might want to make some objection to the relevancy or materiality of the questions and answers. Oh, there is also one other one that you talked to me about, which is not set out in a matter of formal hearing but which I have talked to Mr. Boatright about. There was a deposition taken in the State of New Mexico wherein we have agreed that the issues were substantially the same as involved here. That witness was William Bouse. That is the one you called me about and I do not think there is any question after talking to Mr. Boatright that that deposition comes within the rule of these other witnesses and that that testimony may be considered the same as these other witnesses which I have

1. It is undisputed the petitioner and his counsel confronted and examined each of these witnesses.

just dictated the names into the record. I tried to state what we have agreed to, Mr. Boatright but if I have missed anything I wish you would designate.

The Commissioner: Is there any response on your part.

Mr. Boatright: Yes we are not going to make any objection to the prosecution offering the testimony of the ones that he has enumerated that he intends to offer on the grounds right of cross-examination was not afforded or on the ground that there is any question as to the testimony being admissible as a deposition under the statute. There may be parts of the testimony we will object to because of the nature of the questions that were asked or the incompetency or irrelevancy of the testimony but we are conceding their right to offer and for you to consider as in the nature of depositions the testimony that he has referred to. Of course that applies to us also. If there are any of these that he has enumerated that he does not hereafter offer, we are to have the same right to offer them.[2]

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2. It is undisputed that the Petitioner offered the testimony of witnesses Mrs. Coy Foster, Glen V. Thompson, Lloyd Connor, David Clark, Raymond B. Wade and Ira Gaskin pursuant to this stipulation, and that Respondent, the Advisory Committee offered the testimony of witnesses, Edna Ruth Jarboe, James R. Smith, Martin Carignan, Francis Tuggle and J. P. Hice under this stipulation. Such testimony (after being specifically identified as to volume and page) was admitted respectively in the record as follows: Jarboe, Vol. 3, p. 950; Smith, Vol. 3, p. 598; Carignan, Vol. 3, p. 723; Tuggle, Vol. 3, p. 825. The record affirmatively showing this testimony admitted without objection.

JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1960.

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C. A. RANDOLPH,
Petitioner,

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 398.

C. A. RANDOLPH,
Petitioner,

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.

FOREWORD.

In this reply we will attempt to follow as near as possible the chronological order used by Respondent in the treatment of the several points in its brief opposing issuance of a Writ of Certiorari.

ARGUMENT.

I. Due Process and Rule 5.03.

On pages 6 and 7 of Respondent's Reply Brief, it is asserted that Petitioner is complaining of lack of due process in receiving in evidence as depositions the former testimony, given both *ex parte* and at formal hearings, of witnesses Jarboe, Smith, Carignan, and Tuggle, without objection on his part at the time. On the contrary Petitioner claims that he was denied due process in connection with this testimony in that the Special Commissioner expressly stated in his report, which the court below accepted, approved, and followed, that he would accept as proving Petitioner's guilt the testimony given by these witnesses in a secret, *ex parte* hearing where Petitioner was not present, but that he would reject *in toto* the testimony given by these same witnesses on cross-examination many months after such *ex parte* testimony, wherein some of said witnesses testified that they had been mistaken in their previous testimony and gave testimony absolving Petitioner of all guilt, and others who had formerly given testimony adverse to Petitioner were so thoroughly impeached as to destroy their previous adverse testimony (Pet. pp. 6, 44-52, 72-73, 92-93, 96, 97-102, 117). Petitioner contends such procedure resulted in a denial of due process in that it deprived him of all benefits flowing from his right to the assistance of counsel, right to face his accusers, right of cross-examination and to his day in court. (Pet. pp. 97 to 103 and cases cited).

How disastrous this action of the Court and Special Commissioner was to Petitioner will readily be appreciated when it is considered that the contention of the prosecution was centered almost entirely upon the theory that the

several clients whose cases are involved in the charges contracted generally with Petitioner to handle their cases for the larger fee recited in the contracts and without reference to or discussion of any separation of the investigative aspects from the legal aspects; that the client did not employ an investigator or know that an investigator was involved in his case; that no investigative service was performed by anyone other than the Petitioner and the client, and that the client did not pay any investigator or know that any investigator in his case had been paid. In fact, in an abortive attempt to prove this contention the prosecution called Petitioner as a witness at the outset of the hearings before the Special Commissioner to testify concerning all the dealings he had with the respective clients and their investigators, to tell all the investigative work of the investigators that came to his attention and to produce all statements, correspondence, photographs and other investigative data contained in his files. His testimony on this subject covered the greater part of the hearings in December, 1957, January and March, 1958, which testimony is contained in Vols. 1, 2, 4 and 5 of the record herein, extending over close to 1,000 pages of the record and several hundred exhibits. Thus for the Court to find that this contention of the prosecution was proved by the *ex parte* testimony of these four witnesses, unaffected by their testimony on cross-examination which destroyed all probative value of their previous testimony, was tantamount to finding him guilty of these and all the other counts in the Information and totally disregarding the countervailing testimony not only of Petitioner himself but of a large number of his former clients who appeared and testified.

Respondent first attempts to avoid the full impact of this clear denial of Petitioner's day in court as to said four witnesses (Jarboe, Smith, Carignan and Tuggle) by the Special Commissioner (Comm. Rep. 180, 199) and later

by the Missouri Supreme Court in adopting the Report (Pet. pp. A43, A56), "The Special Commissioner was very charitable to respondent in the findings of facts * * *" (Pet. p. A58), by describing Petitioner's complaint as not knowing "how the Court was going to construe the testimony" (Resp. Br. p. 7) and "because the Court did not draw the inferences therefrom Petitioner desired" (Resp. Br. p. 8). Then it is contended, "In Missouri the report of the Special Commissioner is advisory only" (Resp. Br. p. 9). But when the Court adopted and approved its Special Commissioner's Report *in toto* (Opinion pp. 24, 36, 38, Exhibit B pp. A43, A56, A58) it also necessarily adopted each and every part not specifically reserved or excluded, including, "the Commissioner finds that there is more probative value in her (Mrs. Jarboe's) original testimony than in her testimony on cross-examination, after her schooling" (Comm. Rep. p. 180), and "* * * witnesses when originally testifying from their own recollection, stated one version of the occurrences and then, later on, after having their memories refreshed, testified to a diametrically opposite state of facts." (Comm. Rep. p. 199).

Moreover, the Court's opinion shows conclusively that it deliberately excluded and disregarded the testimony of these witnesses on cross-examination, as did its Commissioner, as completely as if they had not testified on cross-examination at all. Thus, the court convicts Petitioner on the Tuggle count based upon Tuggle's testimony quoted Exhibit B pp. A34 to A36 in the opinion. This testimony was given *ex parte* when Petitioner was not present and was offered by the prosecution (4-825). The quoted testimony is found at 4-828 to 829, 830, 830-831. He was not cross-examined until seven months later (4-846 to 950) when he was thoroughly impeached and discredited. For a summary of such evidence in its entirety see Pet. pp.

48-52. The court makes no reference in the opinion to the evidence elicited on cross-examination.

Similarly, the Court (Pet. A38-A40) quoted only from the *ex parte* testimony of Carignan (4-725, 726, 727, 730-731, 737). Incidentally the Court deleted (Pet. A38) from the quotation: "Mr. Hemker: Let me interrupt you. Had you asked Pat Tuggle to send Smith to you? The Witness: I don't recall whether I had asked him to send Smith to me, but we had discussed * * *" (4-726). This admission alone of the witness, as omitted from his quoted testimony would seem effectually to negate any concept of solicitation in the Carignan case. *In re Sizer*, 306 Mo. 356, 267 S.W. 922, 928, 929. The Court likewise wholly ignored his testimony on cross-examination seven months later when he admitted the understanding that he was to pay Petitioner a fee of 40% if the latter stood the expense of the investigation but only 30% if Carignan stood this expense, and virtually admitted the other essentials testified to by Petitioner and Smith, the investigator, and was otherwise completely discredited (4-748 to 825). See also the Summary of this testimony in its entirety (Pet. A. 44-48).

It is interesting to note that the Respondent also here takes its cue from the Special Commissioner and the Missouri Supreme Court and treats as the settled facts of the case the witnesses' testimony at the *ex parte* hearing and ignores the later testimony on cross-examination where the witness repudiated such *ex parte* testimony.

Thus, it is stated (Resp. Br. p. 11) that "O. C. Brown transported Mrs. Jarboe to McDonald's office * * * and then direct to Petitioner's office in Kansas City * * *". Mrs. Jarboe's *ex parte* testimony, given eight years after she employed Petitioner, is in Vol. 4, pp. 950-978, and her later

testimony on cross-examination, Vol. 4-978 to 1018. Her testimony *ex parte* was vaccilating as to whether or not Brown acompanied her and her sister-in-law to Petitioner's office after McDonald had referred her to Petitioner with a letter of introduction from him, saying that her recollection was not clear (4-962), although she also said she and her sister-in-law after returning from Minneapolis "immediately within a few days went up to talk to Mr. Randolph" (4-956). However, on her later cross-examination, after refreshing her recollection, she definitely denied that Brown accompanied them to see Petitioner (4-999, 990).

Respondent, p. 8 of its Reply Brief, points to Petitioner's offer to submit the case upon the record made before the Advisory Committee in lieu of calling his clients to testify, as indicating his satisfaction with such testimony and his prior treatment. In the first place, it must be remembered that the Information charged Petitioner with improper conduct in handling the cases of some 27 different clients over a period of 6 to 13 years previously. These former clients were scattered over the west half of the United States. To track them down and bring to Missouri such of them as he could persuade to come, or arrange to take their testimony at their widely separated places of residence, would have cost Petitioner many thousands of dollars. He did not have at his disposal the facilities of the Association of American Railroads, including the Santa Fe and Hinkle, its claim agent, enjoyed by Mr. Thompson (11-2884, 2888, 2923) and Mr. Barrick (11-2725), the counsel and special investigator respectively of the Court's Advisory Committee. When this offer was denied he did at great expense locate and bring to Missouri to testify, in addition to those living in Missouri and Kansas, E. E. Jennings and Oscar Brinker from Texas, Dunham from Colorado, Hunnicutt, Thomas, Mears and Beck, from New Mexico, and Goodner from California.

In the second place (relying on the fair consideration of the evidence under the established rules of evidence), he was satisfied with the testimony of the witnesses he had called, and with the cross-examinations of such as had testified to anything of an adverse character. Besides, he had no reason then to anticipate that the Commissioner and Court would rule out and refuse to consider the testimony such witnesses gave on cross-examination, and in the third place the former testimony of witnesses, if offered, would have been received in evidence by the Special Commissioner anyway. *In re Warden*, 146 S.W.2d 874. Please see discussion of this subject on pages 97 to 103 of our Petition for Certiorari.

On page 8 of Respondents' Reply to our Petition they seek to make capital of the fact we did not set out in the appendix to our Petition a copy of Petitioner's written answer to the information filed in the Missouri Supreme Court.

The answer is set out verbatim in the abstract of record of the proceedings in the Missouri Supreme Court certified by the clerk of the Missouri Supreme Court and filed by us herein with the transcript of the testimony. Not only is such certified copy of the answer already before this Court but the Special Commissioner properly described it on page 2 of his printed report where he said: "On November 23, 1956, Randolph's answer was filed, denying the charges of the information."

On page 9 of Respondents' Reply to our Petition herein it is asserted:

> "The Appendix to the petition shows on its face the Petitioner did not attempt to raise any such question (Constitutional) until in briefs filed after the evidence was in and the case decided."

Respondents are clearly in error in making such statement.

On pages A74 to A82 of the Appendix we quoted, from our briefs filed with the Commissioner during the proceedings and before the preparation of his report, the exact words by which we raised the Constitutional questions beginning with our typewritten brief before the Commissioner after the evidence was in but before he prepared his report, the Commissioner's recommendations on the Constitutional questions in his Report making his recommendations to the Court, and in our printed brief filed in the Missouri Supreme Court prior to oral argument and submission to the Court for decision. Certainly that all occurred before the case was "decided" unless Respondents consider the case was "decided" as soon as the evidence was in and before briefs were filed either before the Commissioner or the Missouri Supreme Court. We labored under the impression the case would not be decided until the opinion and judgment of the Missouri Supreme Court was filed.

Respondents charge on page 9 of their Reply Brief herein that "no constitutional question was ever timely raised." We have already pointed out how it was raised before the Commissioner prior to his report and before the Missouri Supreme Court prior to its decision.

In Petitioner's brief filed in the Missouri Supreme Court prior to oral argument and submission Constitutional questions were again raised (Appendix to Petition herein pages A77 to A82). On page 2 of the typewritten Opinion of the Missouri Supreme Court (Appendix p. A19) the Court specifically recognized the briefs before it as properly raising the exceptions of the respective parties to the Commissioner's Report.

This Court has held in a Missouri case that Constitutional questions raised for the first time in the exceptions to the report of a Special Commissioner, as here, are timely raised. *International Harvester Co.* v. *State of Missouri*, 234 U.S. 199, 34 S. Ct. 859, 58 L. Ed. 1278.

Meritorious Constitutional questions may even be raised for the first time in this Court. *Urie* v. *Thompson*, 337 U.S. 163, 60 S. Ct. 1018, 93 L. Ed. 1282.

In the Petition herein at page 42 we pointed out that the decision and judgment of the Missouri Supreme Court necessarily overruled our Constitutional questions. Respondents have not denied that if properly raised the opinion and judgment of the Missouri Supreme Court did have the necessary effect of overruling such Constitutional questions.

This court looks to the question of whether or not the highest court of the state, either in the case sought to be reviewed or in some prior case, has upheld the state statute or other state action, or was afforded an opportunity so to do, against the attack made under the Federal Constitution. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 290, 79 S. Ct. 1157, 1159. We have pointed out that the highest Missouri Court, both were afforded an opportunity to pass upon the validity of Missouri laws and Rules and Missouri action against the attacks here made under the Federal Constitution, and that the Court necessarily upheld the same against the attacks we here make. In addition, the Missouri Supreme Court has heretofore, in several different disbarment proceedings, upheld the validity of these laws, rules and such state action against similar attacks under both the Federal Constitution and the Missouri Constitution. *In re Sparrow*, 90 S.W.2d 401; *Hulse* v. *Criger*, 363 Mo. 26, 247 S.W.2d 855, 858; *Leimer* v. *Hulse*, 178 S.W.2d 338, 339.

II. Impeachment Testimony Treated As Substantive Testimony Against Petitioner.

Respondent, p. 9, of its Reply Brief herein attempts to answer only one of the several respects set forth in the Petition for Certiorari herein in which the Missouri Court violated the rules of evidence in order to convict Petitioner (Pet. pp. 6-8, 87, 89-91, 92, 93, 96, 97-98), to wit, that the Court and its Special Commissioner treated the impeaching evidence of witnesses Feezer and Barrick as to what they testified Petitioner's witnesses Mears, Beck and Goodner said to them out of Court as original and substantive evidence of the truth of such supposed statements and as direct proof of Petitioner's guilt. Counsel contends this testimony was considered below only to impeach the credibility of these witnesses and not as binding on Petitioner. A few of the instances supporting Petitioner's contention in this regard will suffice. The Special Commissioner found,

> "* * * that Fenn was soliciting these cases is supported by Mears' statement to Mr. Feezer * * * that Fenn came to the hospital and solicited his case for McDonald and got Mears to write a letter of employment to McDonald and, that his first contact with Respondent (Petitioner) was after McDonald's office returned Mears' file to Fenn. The Commissioner concludes that, if Mears' statement to Feezer * * * was true, Fenn contacted Respondent about Mears' case" (Comm. Rep. 155).

Also:

> "Feezer's * * * testimony that Mears told him * * * that Fenn was paid for recommending a lawyer and that Fenn frequently did that, is consistent with these views * * * and when McDonald's office declined to proceed with the case Fenn influenced Mears to contact Respondent" (Comm. Rep. 155).

Again:

> "* * * and there is the direct evidence of Mr. Feezer's testimony that Mears told him that Fenn had little to do with the investigation of his case; the Commissioner finds that Fenn was paid for obtaining the Mears' case for Respondent * * *" (Comm. Rep. 163).

Further:

> "The Commissioner does not believe Goodner employed Fenn for what Respondent would knock off his fee * * * Goodner's statement to Mr. Barrick that Fenn was paid less than $500 and that no cashier's check for Fenn was purchased * * * is of more weight * * *" etc. (Comm. Rep. 174).

And:

> "It is therefore felt that such statements as those of Mears to * * * Feezer * * * were admissible for * * * impeachment of Mears as well as in connection with their hearing upon the conduct of Respondent." (Comm. Rep. 206).

Now, Petitioner excepted specifically to these findings of the Special Commissioner and assigned error thereon in his brief before the Missouri Supreme Court, (Brief, pp. 67, 88 *et seq.* (Petition herein, Exhibit F, pp. A74 to A82)). But the Court in all things approved, adopted, and made said Report its own in the opinion. Thus, the Court said:

> "The findings of the Commissioner are fully supported by the evidence" (Pet. p. A43).

And:

> "An examination of the record in the case before us and the report of the Special Commissioner has

led us to the conclusion that the Commissioner was extremely charitable in his findings of facts * * *" (Pet. p. A56).

"as we have said supra, the Special Commissioner was very charitable to respondent in the findings of facts * * *" (Pet. p. A58).

Respondent, p. 10 of its Reply Brief herein, points to the Court's opinion (Pet. Exhibit B, pp. A53-A55) as indicating the Court limited the effect of the above testimony to impeachment. But there is nothing in what the Court said to indicate an intention so to limit this testimony. In view of what the Court said above without any qualification, both before and after the part of the opinion relied upon by Respondent, it is clear the Court, like its Commissioner, treated this testimony as substantive proof of Petitioner's guilt. Otherwise, in view of Petitioner's vigorous attack upon the Commissioner's finding of guilt based upon this impeaching evidence, the Court would have expressly limited such evidence to impeachment.

That the Court had no intention of so applying the rules of evidence to this testimony conclusively appears from its similar approval and refusal to strike down other and further violations of the rules of evidence by the Commissioner so vigorously excepted to and assailed in Petitioner's brief and motion for acquittal or for Rehearing in the Missouri Court on Missouri and Federal Constitutional grounds (Pet. pp. 9, 10, A64, A65, A70, A72, A80. A81). These violations of the rules of evidence by the Commissioner in his Report and adopted by the Court are referred to and set forth in the Petition herein among the Questions Presented, pp. 6, 7 and 8, and discussed with page references to record, Report and Opinion, pp. 92, 93, 96, 97, 98 and 106, and will not be repeated here.

These other and further violations of the rules of evidence and consequent constitutional infringements Respondent sees fit to ignore entirely.

Additionally, when it is considered that the Court expressly convicted Petitioner on a charge (Pet. pp. 7, 103 —permitting his clients to contract with lay investigators on a contingent basis) not contained in the Information, on which he was never tried, which theretofore had not only never been held by a Missouri Court to be improper but had been expressly made permissible by a Missouri Statute and had by the same Court been held to be proper (Pet. pp. A55-A56, 103-105); and when Missouri disbarment cases are examined, particularly Pate (119 S.W.2d 11, 24), Conner (207 S.W.2d 492, 496), and Sparrow (90 S.W.2d 401, 404), it is readily apparent that the Court was saying that the rules of evidence were being discarded and disregarded because not by the Court "deemed appropriate to disbarment" (*In re Conner*, 207 S.W.2d l.c. 496). The Court specifically cites and relies on the Conner case (Pet. pp. A20, A57). For a fuller discussion of the Missouri Court's disregard for the rules of evidence in this and other disbarment cases, in violation of the Missouri Constitution, a Missouri Statute and its own Rule 5, relating to disbarment proceedings, see Petition, pp. 89-106.

Realizing that serious constitutional infringements inhere in the Commissioner's findings in the above matters, Respondent now seeks to repudiate him and insulate his findings from the Court's opinion and judgment in this case. Thus, at p. 9, of its Reply Brief, it said "* * * the report of the Special Commissioner is advisory only", and that the writ sought herein is directed "to the opinion of the Missouri Supreme Court * * * not to the Commissioner's findings". This, of course, would be true if the Court had seen fit to disavow such findings. This the Court did not

do, but in all things approved and adopted them as its own findings, (Opinion, Petition Exhibit B, pp. A43, A56, A58) as demonstrated above. The Court disagreed with its Commissioner in one important respect only and that was that Petitioner should be permanently disbarred instead of given a suspension for one year, recommended by him. Respondent here, acting as Informants below, made a different contention in their principal brief before the Missouri Court. They said, p. 6, in that Brief:

> "Any argument Informants would make, like the Statement of Facts, *would be mere repetition of the findings and conclusions of the Commissioner.*" (Emphasis supplied.)

Having supported these findings of the Commissioner and pursuaded the Court to embrace, approve, adopt and reiterate them, it comes with poor grace indeed for Respondent now to abandon him and repudiate him.

III. Quantum of Proof.

On pages 10 and 11 of Respondents' Reply to our Petition it is charged that Petitioner asserted that the Opinion of the Missouri Supreme Court was based on the testimony of three witnesses; Tuggle, Carignan and Deason.

The record does not support that statement. We made no such statement. We referred to page 12 of the typewritten opinion of the Missouri Supreme Court where the Court mentioned Carignan, Tuggle, Deason, Donnelly, Admr. Brown, and Bouse. We then referred to our summary following Part II of our Statement of Facts where we summarized the testimony of Carignan, Tuggle, Deason, Hice, Spriggs and Donnelly, Admr. Brown (also known as the Pauline Brown case) (Petition pp. 44-66), so our argument was not confined to the three witnesses.

While on page 11 of Respondent's Reply Brief herein it refers to the testimony of certain other witnesses it nowhere contends that the witnesses named on page 12 of the opinion and thereafter discussed at length by the Missouri Supreme Court were not considered by Respondent as the strongest witnesses in support of the result reached by that Court.

Petitioner, p. 117, only refers to the "Summaries" of the testimony of the only witness who said anything in the record that could properly be considered adverse to Petitioner on the important issues, including those relied upon by the Court as being adverse. These Summaries cover pages 44 to 66 of the Petition and digest the testimony of Carignan, Tuggle, Deason, Bouse, Hice, and of Petitioner's testimony relating to Pauline Brown and Spriggs, neither of whom testified. In referring to "page 12" of the Opinion (Pet. pp. A30-A31), Petitioner was only saying that the above summaries included the summarized testimony of the witnesses mentioned by the Court whose adverse probative value was thereby nullified and destroyed. The Court at page 12 of its Opinion did not limit its reference and discussion to Tuggle, Carignan and Deason, as stated by Respondent. It also said, "* * * we shall review a number of cases in which Jennings, Brown and Fenn participated". These men were the investigators in the cases for certain clients whom the Court proceeds to name and discuss their cases, as well also as the testimony of Tuggle and Carignan (on later pages of the Opinion) whose cases were investigated by Smith. Thus, on page 12, the Court discussed the case of Pauline Brown, investigated by Jennings, her cousin. Then the Bouse case, investigated by the late J. N. Fenn, of Clovis, New Mexico, was discussed (Pet pp. A31-A34). The discussion of the testimony of Tuggle and Carignan follows (Pet. pp. A34-

A40), then that of Deason, whose case was investigated by Brown (Pet. pp. A40). But the important point Petitioner was clearly making was that the "Summaries" included the testimony not only of the several clients discussed by the Court, but also that of or relating to all others who in any view could be considered adverse to Petitioner. So that the Court's statement, "We could go on and on discussing other cases" (Pet. p. A42) adds nothing to the force or substance of its Opinion, since such Summaries showed that all those not discussed by the Court were 'subject to the same frailties" as those it did discuss.

Respondent's purpose in making the inaccurate and baseless attack upon statements in the Petition herein, p. 117 of Respondent's Reply Brief, though at first puzzling, becomes apparent in what follows, p. 11 of Respondent's Reply Brief. It is a device to create the false impression that Petitioner is claiming that the Court discussed and decided his guilt upon only three cases, Carignan, Tuggle and Deason, and that having discredited and destroyed their testimony he could dispose of all other witnesses by a sweeping general statement, which he would not be justified in doing in view of Respondent's impressive and extravagent characterization of the supposed testimony of a host of witnesses not otherwise accounted for by Petitioner. Counsel omits to say that most of the cases to which he alludes, p. 11, are the subject of "Summaries" in the Petition (pp. 44-66), an examination of which will, we confidently believe, refute the unjustified imputations. Certainly a reading of the entire evidence in the record relating to these cases, page references to which are contained in the "Summaries", will suffice to dispel any reasonable probative effect to establish the conclusions stated.

We have demonstrated above that in the Jarboe case not included in the "Summaries", the testimony does not

reasonably support either Respondent's stated conclusion or that of the Court, because both base their conclusion upon Mrs. Jarboe's *ex parte* testimony, which at the most was equivocal after eight years, whereas, when she testified some months later on cross-examination, after refreshing her recollection, she repudiated all said *ex parte* testimony upon which the stated derogatory conclusion is founded (4-950-978, 498-1018). The Court below, as stated, ruled with its Special Commissioner that it would throw out and not consider this latter testimony, and Respondent here does likewise.

Moreover, it would seem that by thus building false conclusions upon a false premise, Respondent hopes to gain a psychological victory to which it is not entitled. Respondent knows that this Court is greatly overburdened and can review only a limited number of cases. So, if it is able to create a quick, initial impression that substantial justice was probably done below by making a number of sweeping and irresponsible statements concerning what the evidence established that possibly might entail the time-consuming task of examining a large record to determine the truth or falsity thereof, the Court might conclude to deny a review. That such is Respondent's strategy is suggested elsewhere in its Brief concerning which we will have more to say further on.

IV. Claimed Omissions and Inaccuracy in Petition for Writ.

Respondent, p. 12 of its Reply Brief, asserts that Petitioner's Summary in Spriggs (Pet. pp. 63-66) shows inaccuracies and omissions "illustrative of omissions and inaccuracy indulged in by Petitioner in summarizing evidence from the record". Then follows a series of various matters stated to have been shown by the record and found

by the Court and the Commissioner in Spriggs, claimed to have been stated inaccurately or omitted in the Summary. It is submitted that Petitioner's Summary is a fair and full statement of the testimony in the record relating to the Spriggs matter as shown both by the page references in the Summary and in Respondents' Brief. Also, the Summary fairly and accurately states the facts which the evidence proves, which Respondent does not do. Thus, to point out a few misstatements in which Respondent indulges: (1) Spriggs was killed at Ricardo, N. M., which was not "several hundred miles from Clovis", as stated, but according to the Santa Fe Time Table, was 73.6 miles; (2) he was not killed "at four o'clock in the afternoon" on August 22, 1949, as stated, but at 1:45 P.M. on said day (Ex. 2-2a, 10-2564); (3) Fenn was not at the Spriggs home in Clovis "the evening of August 22, 1949", as Respondent states, but refused the request to go that day of Mr. Valentine who was acting at the behest of Mrs. Spriggs and her mother, Mrs. Morton. He did not go until Mr. Valentine came to him the second time at the urgent request of deceased's family which was the day following. "* * * but when Valentine came back the next day, he went" (Comm. Rep. p. 88, 8-2010, 2011); (4) Fenn did not mail the contract to Petitioner, as stated. "Randolph testified * * * but did not know who sent them" (Comm. Rep. p. 59, 5-1153). For a further statement fairly summarizing the testimony in Spriggs, keyed with page references to the record, which effectively demonstrates the falsity and unfairness of the imputations implicit in Respondent's stated conclusions, see Petitioner's statement in his Brief in the Missouri Supreme Court where he was designated as Respondent (Br. pp. 13-15).

The only other case mentioned, pp. 11 and 12, of its Reply Brief, by Respondent which is not fully covered in the "Summaries" (Pet. pp. 44-46) is Taylor. To save

space and the time of all parties concerned, we refer the Court to a fair and succinct statement of the pertinent facts in Taylor, with appropriate references to the record, found also in Petitioner's (Respondent's below) printed Brief, in the Missouri Supreme Court pp. 11-13, a copy of which brief is attached to the Transcript of the Record Proper (Two Volumes) certified by the Clerk of the Missouri Supreme Court. Also, as to how and when the question of whose handwriting Taylor's first letter was in arose, see Vol. 10, pp. 2573-2577, of the record.

Moreover, we think that a comparison of the extravagant and unjustified assertions, Respondent's Reply Brief, pp. 11 and 12, as to what the evidence proved in a number of cases, with the evidence in the record relating to them will go far to convince the Court that the Missouri Court and its Advisory Committee permitted suspicion and surmise to perform the office of evidentiary and legal proof, which combined with a prosecution complex resulted in an unwarranted finding of guilt which fails to meet Federal Constitutional requirements of due process and equal protection of the law guaranteed by the Fourteenth Amendment (Pet. pp. 107-112).

For further and additional digests and summaries, of the evidence relating to certain cases, with page references to the record, which will conserve the time and labors of the Court, see also Petitioner's (Respondent below) printed Brief in the Missouri Supreme Court, as follows: Hice, p. 388; Tuggle, pp. 20-30; Carignan, pp. 31-38; Deason, pp. 38-49, 109-132; Jarboe, pp. 50-55; Pauline Brown, pp. 55-56; C. C. Jennings, pp. 58-59; Spriggs, pp. 13-15.

V. The Law Pertaining to Due Process and Sufficiency of Proof.

Respondent in its Reply Brief has seen fit to ignore and remain silent, except on the periphery by an occa-

sional inference, concerning all except one of the constitutional questions, timely and duly raised and sharply presented in the Petition for Certiorari herein (Pet. pp. 6-9, 41-44, A60-A72, A74-A85, 83-127). Some of these questions counsel does not even mention. Respondent undertakes to discuss only the Court's Rule 5.03 (Reply Br. pp. 5, 6, 7 and 16), but only one aspect of the Rule—the function of the Advisory Committee to investigate Missouri lawyers and to find probable cause to file against them in court. This, it is said, Respondent's Reply Brief, pp. 6, 7, is a function performed by every grand jury, which would be invalidated under Petitioner's contention.

But this argument is a palpable evasion. It wholly fails to meet the Fourteenth Amendment violations inherent in the Missouri Court's Rule 5 and relied upon in the Petition herein (Pet. pp. 5, 11, A89-A101, 66-72, 75, 77-83). When that "Grand Jury", after its investigation of the lawyer and voting a "True Bill", fails to disband and bow out of the controversy, but instead files an action thereon in the Court in its own name, assumes the role of prosecutor and proceeds to marshal the witnesses and the evidence and prosecute him vigorously through the Courts, we are beginning to have some of the elements of this case. When there is added to these steps the further ingredients that this "Grand Jury" is part and parcel of a Supreme Court that named it and also made the laws (Rules) under which the lawyer was so investigated, set up such procedural machinery, and is the tribunal before which the lawyer is tried and convicted, then we have this case (Pet. pp. 66-72, 75, 77-82). Also when that "Grand Jury", as here, is vested with the absolute, unfettered and arbitrary power to decide in secret which lawyer it will choose to openly disgrace and which lawyer it will choose not to disgrace and "seal the record" as to the latter, without any supervision of a representative of

another branch or department of government, such as a prosecuting attorney, such power also becomes invidiously discriminatory and void under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (Pet. pp. 77-78).

Respondent apparently takes signal comfort from recent cases of this Court touching various aspects of the relationship of lawyers to the Courts and the public (Br. 13-16). After a brief reference to the Cohen (81 S. Ct. 954) and Lathrop (81 S. Ct. 1826) cases, it is asserted with apparent confidence, p. 14:

> "The foregoing authorities fully establish that Rules 4 and 5 promulgated by the Supreme Court of Missouri provide for procedural due process with respect to disciplinary proceedings".

With deference, we submit that these cases do not establish or even remotely support the validity of such rules against the attacks Petitioner here makes under the Fourteenth Amendment. There is no similarity between this case and either of those cases, in the facts, in the issues or in the law involved.

In Cohen the Court decided only the narrow question of whether New York could, consistent with the Fourteenth Amendment, "disbar an attorney who, relying on his state privilege against self-incrimination, has refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct" (81 S. Ct. l.c. 955). For the background of the legislative authority creating the Inquiry and the proceedings upon which the controversy was based, the Court (81 S. Ct. 956) referred to the prior case of *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 79 S. Ct. 1157. The Legislature by Sec. 90, subd. 10 of New York's Judiciary Law had vested in the Appellate Division of the Supreme Court (trial

court) the power over the admission and discipline of members of the bar. Upon Petition by the Brooklyn Bar Association, alleging unethical practices in Kings County, the Appellate Division set up an Inquiry at a Special Term of the Supreme Court to be presided over by Justice Arkwright to conduct hearings and report back to the Appellate Division with his recommendations (360 U.S. 288, 289, 79 S. Ct. 1158). Cohen was subpoenaed to appear at the Inquiry and testify as a witness and to produce certain records. He refused to answer pertinent questions relating to his knowledge and activities of the character which was the subject of the Inquiry, claiming privilege against self-incrimination under the New York Constitution. The judge in charge of the Inquiry reported these facts to the Appellate Division recommending disciplinary action. The Bar Association filed a petition for discipline of Cohen in the Appellate Division for refusal to testify before the Inquiry as a violation of canons of ethics requiring lawyers to be candid and frank before the Court and to inform the Court of known infractions of canons forbidding fee-splitting with laymen, etc. (McKinney, N.Y. Laws, Judiciary Law, pp. 774-775). The Appellate Division ordered disbarment, not for claiming his privilege against self-incrimination, "but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices * * *" (... U.S. ....., 81 S. Ct. 956-953). The New York Court of Appeals affirmed. This court on Certiorari only held (1) that the failure of N. Y. to afford protection against self-incrimination under its Constitution was not a matter of Federal concern (2) that the Fourteenth Amendment did not implement the Fifth Amendment to the Federal Constitution so as to require New York to grant such immunity under said amendment, and (3) that New York's judicial inquiry into such practices and compelling such testimony

was not so devoid of rational justification as to be arbitrary or discriminatory that Cohen was deprived of his liberty without due process.

So it is clear that in Cohen, contrary to the provisions of Rule 5, the Judge who conducted the Inquiry confined his activities to investigative functions of a grand jury. Unlike a grand jury he did not even charge Cohen with an offense (indict), much less did he file and prosecute a charge. He only reported the evidence to the Appellate Division with his recommendation. There his connection with the case ended. Nor did the Appellate Divison, the trial court in the case, file and prosecute the charge. This was done by the Brooklyn Bar Association. On appeal from the conviction the case was reviewed by yet another separate and independent tribunal, the N. Y. Court of Appeals. Moreover, the laws (canons) for a violation of which he was tried, as well as the entire machinery used, was authorized and provided for by still another branch of government—the New York Legislature.

Aside from the above, this Court in the Cohen case would seem to have left open for consideration such questions as Petitioner's condemnation of Rule 5 on Federal Constitutional grounds, in using (81 S. Ct. 962) the following language:

> "Clearly enough, factual distinctions are the determinative consideration upon the question of what process is due in each of these cases. Otherwise making state procedures vary solely on the basis of the given occupation would indeed be nothing less than a denial of equal protection to bankers, contractors, railroad employees and government employees."

Likewise, in Lathrop there is nothing said to ease the impact of the Fourteenth Amendment infirmities that clearly inhere in Missouri's Rule 5. Nor did this Court

hold or infer, as stated at page 14, "that the highest courts of the States have inherent power to promulgate rules with respect to the integration of the Bar, including procedures for the initiation of disciplinary proceedings * * *." Instead, the Court in its plurality opinion points out that the Wisconsin Legislature first passed a law to integrate the state bar providing, "the Supreme Court by appropriate orders shall provide for the organization and government of the association", etc., which the Supreme Court later implemented in its integration order, this Court saying,

> "Integration of the Bar was effected through an interplay of action by the legislature and the Court * * *." (81 S. Ct. 1828).

Also:

> "Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation * * * the action had the characteristics of legislation." (Id. 1829).

This Court in Lathrop only affirmed the action of the Wisconsin Supreme Court in sustaining the demurrer to the plaintiff's petition in which he sought a return of his dues which he as a Wisconsin lawyer was compelled to pay to the Wisconsin integrated Bar, based upon his claim of a violation of his rights of association and freedom of speech under the First Amendment. A majority found that his claim of a violation of his right of association was without merit. His claim of a violation of freedom of speech did not muster a majority of this court either pro or con.

In the Lathrop case, as in Cohen, this Court stresses protective provisions contained in the Wisconsin Integrated Bar, the absence of which from Rule 5 marks the latter's infirmities under the Fourteenth Amendment in the respects here challenged by Petitioner.

Thus, this Court finds it pertinent to quote from the Wisconsin opinion that the acts complained of were not those of the Wisconsin Court, but a great majority of the individual lawyers of the State, saying the Court had determined,

> "* * * that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting * * * the practice of law, the same to be voiced through their own, democratically chosen representatives comprising the board of governors of the State Bar." (Id. p. 1838-1839).

Moreover, it was pointed out that the Integrated Bar decentralized disciplinary powers and procedures from the Court itself to local grievance committees named by the Bar's popularly elected representatives through whom the Integrated Bar functioned:

> "It found that the State Bar's participation in the handling of grievances improved the efficiency and effectiveness of this work." (Id. p. 1836).

Also:

> "Prior to integration the Board of State Bar Commissioners (The counterpart of the Advisory Committee in Missouri) conducted and paid for the investigation of grievances. Since then the grievance committees have performed most of that work, * * * a former president of the State Bar commented of these committees' performance of their functions: 'The result is that a majority of complaints are adjusted or explained to the satisfaction of the complainant, and the State Bar Commissioners are saved considerable time and effort * * *'." (Id. 1836, Note 11).

This vital separation of the investigative powers from the determination of guilt or innocence of the lawyer was also pointed out in said opinion in Lathrop:

> "Although the State Bar participates in the investigation of complaints of misconduct, * * * final power to disbar or otherwise discipline any member resides in the Supreme Court." (Id. p. 1830, Note 6).

Reverting to the Cohen case, this Court did not hold, as Respondent assumed, p. 14, Respondent's Reply Brief that a state can constitutionally combine investigational, prosecutional and adjudicatory functions in one person or body as Rule 5 clearly does, but only that it may afford a different procedure in "judicial investigations" (which the "Inquiry" acting as a grand jury was), from that in "criminal prosecutions". (81 S. Ct. p. 962).

It is difficult to perceive any basis for Respondent's contentions, p. 15 of its Reply Brief, in the recent decisions of this Court in Konigsberg (U.S. , 81 S. Ct. 997) and Anastaplo (U.S. , 81 S. Ct. 978). This Court in the majority opinion pointed out in Anastaplo (81 S. Ct. p. 982) that the basic issues in that case were settled in Konigsberg (Majority Opinion), saying:

> "We have there held it not constitutionally impermissible for a State * * * to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications."

We find nothing in either of these cases incompatable with or that militates against any contention made in our Petition herein. Respondent points to nothing of that character in either case.

Respondent, pp. 16, 17, 18 and elsewhere in its Reply Brief, in criticism of the Petitioner herein, states that this Court is not concerned with such matters as conflicts in the testimony, the credibility of the witnesses, the weight

of the evidence, trial errors, retrying a case on the merits, and like questions. In this, Counsel chooses to ignore the substantial and important question raised by Petitioner and supported by many cases cited from this Court that the evidence in this case, as a matter of law, does not either under Missouri decisions or under the decisions of this Court support the judgment herein of Petitioner's guilt and thereby deprived him of Due Process of Law under the Fourteenth Amendment (Pet. pp. 8, 107-112).

Under this point Respondents attempt to demonstrate that the finding of facts of the Supreme Court of Missouri is conclusive on this Court.

In support of such contention Respondent quotes on page 16 of their brief from the case of *Milk Wagon Drivers Union, etc.*, v. *Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, l.c. 555. On the same page and shortly preceding Respondent's quotation this Court said:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

Furthermore it is our contention that this case comes within the exception noted in Respondents' quotation, to wit: that the findings are "so without warrant as to be a palpable evasion of the constitutional guarantee here involved."

To accept such a conclusion as Respondents advance "would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.*, v.

Scourlook, 347 U.S. 110, 121, 74 S. Ct. 403, 410 and cases cited in footnote 11.

In the case of *Craig* v. *Harney*, 313 U.S. 367, 373, 67 S. Ct. 1249, this Court said (l.c. 1253):

> "In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. See Norris v. State of Alabama, 294 U.S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074; Pierre v. State of Louisiana, 306 U.S. 354, 358, 59 S. Ct. 536, 538, 539, 83 L. Ed. 757; Chambers v. State of Florida, 309 U.S. 227, 228, 229, 60 S. Ct. 472, 473, 474, 84 L. Ed. 716; Lisenba v. People of State of California, 314 U.S. 219, 237, 238, 62 S. Ct. 280, 290, 291, 86 L. Ed. 166;
>
> Ashcraft v. State of Tennessee, 322 U.S. 143, 147, 148, 64 S. Ct. 921, 923, 88 L. Ed. 1192. This is such a case."

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, this Court said (l.c. 270):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, this Court said (l.c. 1178):

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1

> Wheat. 304, 4 L. Ed. 97; Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5. This principle was well stated in Niemotko v. State of Maryland, 340 U.S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267."

On page 17 of Respondents' Reply Brief it is stated:

> "The only logical conclusion to be reached is that the proof of Petitioner's guilt had to be all the more conclusive because of the character of testimony in the case."

We submit that conclusion is disproved by the fact the Commissioner and the Court elected not to believe the testimony of Petitioner with his good reputation but chose to believe instead the impeached and self-contradictory testimony of witnesses such as Tuggle, a forger and blackmailer and Deason, a blackmailer (Petition pp. 75-76, 72-73, 26).

Respondent, p. 17, criticizes Petitioner in a similar vein for devoting two-thirds of a page in his statement (Pet. p. 15) to the impressive list of character witnesses to his good character and reputation for veracity and ethical conduct, charging this to be a violation of this Court's Rule 23 (c) and (e) as not "a concise statement of the facts." In so doing he likewise fails, as did the Missouri Court, to give Petitioner the benefit of Missouri decisions holding that where the evidence establishes the accused lawyer's good reputation his testimony cannot be overturned by contrary testimony of disreputable and unscrupulous clients and others of an equivocal nature, or where they are impeached and discredited, which was clearly shown here (Pet. pp. 44-66). *In re Frith*, 233 S.W.2d 707, 717; *In re Mason*, 203 S.W.2d 750, 769. Similarly, this Court holds that where a valuable right has been conferred upon a person or he has attained a status pursuant to a proceeding by which it is determined that he possesses the qualifica-

tions, character and other requisites to such right or status, such as a right to citizenship, he cannot be deprived thereof in a subsequent proceeding to revoke such right or status except on proof "by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' ". *Schneiderman* v. *United States,* 320 U.S. 118, 158. Also that the attempt to revoke such right or status must fail as a matter of law where the evidence is conflicting.

> "* * * the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof" (Id. p. 155).

Therefore, the character testimony not only became one of the predicates to establish Petitioner's right to an acquittal for failure of the evidence to convict him, but this testimony also established that the Missouri Court evaded the prior decisions in Frith and Mason and thereby engaged in arbitrary, capricious, and discriminatory action which further deprived him of due Process and Equal Protection of the Law in violation of the Fourteenth Amendment (Pet. p. 108 *et seq.*).

VI. Rules 23(c) and 23(e).

In an effort to avoid meeting the case on its merits Respondent charges that our Petition for the Writ herein violates rule 23 (c) and 23 (e), which "requires that questions for review here be presented without unnecessary detail and by a concise statement of facts." It cites no cases in support of its challenge to the Petition.

What is a concise statement of facts without unnecessary detail necessarily depends on the facts and issues to be presented.

The basic issues here are briefly: whether Petitioner received a fair trial "before a tribunal which meets at least

concurrently prevailing standards of impartiality." (*Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, 71 S. Ct. 445, 454); whether the hearing Petitioner received was "a real one, not a sham or a pretense" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164, 71 S. Ct. 624, 644); whether the Supreme Court of Missouri acting directly or through its wholly controlled agencies has not deprived Petitioner of his Constitutional rights to a fair trial in a case where it occupies the position of party, prosecutor, advocate and arbiter (Petition pp. 67-72) and by its opinion demonstrates its great interest and concern in upholding and vindicating the actions of its agencies in the prosecution and in punishing Petitioner for resisting such agencies by making a defense against the charges filed against him; whether the disbarment of Petitioner is without rational support in the evidence; and whether the Missouri Supreme Court has refused to apply the established rules of evidence in this case in an arbitrary and discriminatory manner.

The presentation of such issues necessarily requires a longer and more detailed statement of facts than the ordinary case in order to fully and fairly present the facts and issues here involved.

We submit that considering the complexity of said issues our Petition complies with the rules in the respects mentioned by Respondent.

Furthermore, we have divided our Petition into appropriate heads with descriptive sub-headings which enable the Court to quickly and easily read and understand our contentions and the actual facts shown by the record.

We have already answered Respondent's argument on page 18 of its Reply Brief and in its Appendix I to such brief as to the right to effective confrontation and cross-

examination under point I, *supra*, this brief and at pages 97 to 103 of the Petition herein.

VII. The Missouri Court's Opinion Cannot Be Defended Against the Attacks Here Made under the Federal Constitution.

On page 13 of their brief Respondent adopts as the premise to its brief the formula that notice and hearing before a legally competent tribunal fully satisfies all the requirements of due process. It does not recognize essential fairness as any part of this constitutional concept and does not undertake to defend against our charge of fundamental unfairness in the trial and conviction of this Petitioner.

In the case of *Carter* v. *People of State of Illinois*, 329 U.S. 173, 67 S. Ct. 216, in a Certiorari proceeding this Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

Respondents have not attempted to answer our charge that the Missouri Supreme Court in this hearing acted both as judge and party, arbiter and advocate in the same cause and that such is the necessary result of its Rule 5.

In the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, 70 S. Ct., this Court said (l.c. 454):

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."

We confidently believe that after reviewing the record this Court will conclude the State determination was without rational support in the evidence as was the situation in the case of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810.

There is a vague undertone throughout Respondent's discussion of the Constitutional infirmities in the Missouri machinery and procedure in disbarment proceedings which were implemented in this case, seeming to bottom an explanation and excuse for the court's departure from constitutional procedures upon an ancient notion of "inherent power" of courts over members of the bar as "officers of the Court". However, in view of rather definite pronouncements of this Court in recent years that the right to practice law is something more than a mere privilege to be given, withheld or taken away at the will of the State, but instead is a valuable property right of which a person may not be deprived except for cause and through procedures that satisfy well known Federal Constitutional safeguards (*Schware*, 77 S. Ct. p. 756; *Konigsberg*, 77 S. Ct. p. 721; *Summers*, 325 U.S. 561, 566-67, 568-69, 65 S. Ct. 1307, 1310; *Ex parte Garland*, 71 U.S. 366, 370), counsel apparently has not seen fit to take a firm stand upon such unstable concept of a lawyer's status. Although making an occasional reference to the "inherent" power of the courts in such matters he does not attempt to define the exact nature or scope of such supposed power. Rather the argument seems to assume that Petitioner in

this disbarment proceeding on account of the Missouri Court's "inherent" power has no standing to complain of Fourteenth Amendment encroachments which admittedly would be available to persons in other relationships. Thus it is stated, Respondent's Reply Brief, p. 18:

> "the kind and character of judicial proceedings conducted with respect to the petitioner in this case meets all the requirements * * *." etc.

Respondent, p. 18 of its Reply Brief, also refers to Petitioner's trial as being "in accordance with traditional judicial proceedings".

Let us examine this vaunted "inherent power of the Court over the bar" that brooks no interference, recognizes no judicial restraint, and defies all classification among well-ordered legal procedures of otherwise constitutional governments, that Missouri and some other states adhere to.

Concededly, and as a matter of judicial notice, it had its origin in the early English courts which were the agencies of kings having absolute and despotic power. No doubt this claimed inherent power of the King's Courts over the Bar was a device of the Crown to salvage a modicum of the tyrannical prerogatives King John was forced to surrender to the nobles when at Runnymede in 1215 he signed the Magna Charta, which is the foundation of our Bill of Rights and by implementation as amendments to the Federal Constitution, the cornerstone of our liberties.

This concept of absolute power of the Crown over the bar through the king's courts followed English rule to America among the colonies. That rule was ended by the American Revolution. The former English colonies then passed from the domination of an absolute monarchy to

free, independent and sovereign states dedicated to democratic ideals and to a representative form of government, based upon constitutions embodying the principles announced in the Declaration of Independence. These states shortly thereafter under the Federal Constitution, became part and parcel of our Federal Government. England was never under a constitutional form of government.

It is true that the English common law became the foundation in part of American jurisprudence, including that of most of the states, but only to the extent that it was appropriate to like or similar conditions in America and comported with our constitutional government. Missouri did this by statute in effect since statehood which limited common law adopted to such principles as were "not repugnant to or inconsistent with the constitution of the United States * * * or the statute laws * * *" Sec. 1.010, R.S. Mo. 1949. Many principles of the common law in England have been outmoded in America both because of the times and the differences in the conditions, laws and needs in the two countries. To illustrate, under old English common law it was recognized that the master not only had a right to the services of his servant but also the right and authority to inflict physical punishment on him. Even the more harsh but descriptive term of that relationship has largely given way to that of Employer and Employee in modern America. Moreover, under the old English common law the husband was absolute master of his household and even had the right and privilege to inflict physical punishment on his wife. In modern America the wife has become in every way the equal of her husband if not his superior.

Other cogent considerations intervene which leave little doubt that the old English notion of "inherent power" over the bar by the courts, which either necessitates or

permits procedures that infringe upon Constitutional rights, is wholly incompatible with conditions in the bar and the courts as they exist in America today, and more especially in Missouri.

In Missouri in the rural areas the judges of the trial courts who must be lawyers (Const., Art V, Sec. 25), are elected by popular vote and must answer to the people. Even under Missouri's Nonpartisan Court Plan, while a judge is nominated from members of the bar by a commission and appointed by the Governor he is still required at stated intervals to submit his record as a judge to the people for approval or disapproval and may continue in office only upon receiving a majority favorable vote of the people. Article V, Section 29 (a) to (g), Mo. Const., 1945, Vol. 1, Vernon's Annotated Missouri Statutes, R.S. Mo., 1949, p. 334.

The reasons assigned by the Missouri Courts for the claimed unbridled power of the courts to control and discipline the bar through such unorthodox procedures and by evidence that does not satisfy reasonable requirements of trustworthiness is for the protection of the Court, the profession and the public, due to the Bar's peculiar opportunity to do great public harm. *In re Pate*, 119 S.W.2d 11, 24. But the judges, who are the lawyers of yesteryear, are in a position to do the public and all concerned vastly greater harm (they adjudicate legal rights, not merely advocate causes). When charges of misconduct are made against them they are provided by law an elaborate system whereby they must be charged through protective procedures by one body, be prosecuted through another and tried through yet a third body, before they can be removed as judges (1945 Const., Art. VII, Sec. 1).

So, it would seem obvious that it is irrational, arbitrary and discriminatory for Missouri to provide, as it clearly

does, that the stated public policy will be promoted by trying its practicing lawyers, whether based upon any notion of "inherent" power over them by the courts or not, by a procedure and system of proof of the above character which are devoid of the constitutional safeguards pointed out herein by Petitioner, but that such policy is protected in the trial of the lawyers of the Judiciary by procedures and systems of proof which fully meet all constitutional requirements.

It would seem that the courts, the profession and the public are amply protected against any improper conduct of lawyers in their relations with the courts, by the court's powers of direct and indirect contempt, to which lawyers and laymen alike are subject. As to other infractions and misconduct of lawyers, not directly affecting the functioning and dignity of the court, there would seem to be no logical or valid reason why they should not be redressed by procedures and proof media that observe and satisfy the fundamental rights of all which are implicit in American Constitutional government, and which as a minimum would insure them a fair trial before a fair tribunal.

In the case of *Cohen* v. *Hurley*, 81 S. Ct. 955, 962, in a lawyer case this Court stated that factual distinctions are determinative of what process is due in any case and it would be a violation of the Constitution to make a person's occupation the sole basis of what is due process as to him.

In view of Respondent's introductory paragraph, p. 13, to his discussion of the Missouri Court's exercise of "original jurisdiction" in this case and its attempt thereby to buttress the soundness of the Court's jurisdiction and judgment against the constitutional attacks made by Petitioner, we think it pertinent and relevant to point out how

tenuous the Court's claim to a right of "original jurisdiction" really is.

The Missouri Constitution of 1875 limited the Supreme Court's jurisdiction, except for issuing extraordinary writs and exercising superintending control over all inferior courts, to "appellate jurisdiction only". (Art. VI, Sec. 2, p. 215, Vol. 1, V.A.M.S. Const.). The language of the 1945 Missouri Constitution in this respect though slightly different does not confer "original" jurisdiction upon the Supreme Court. (Secs. 1, 3, 4, Art. V, *id.* p. 328). (See Appendix following for text of constitutional provisions.)

The Court has never contended that any Missouri Constitution ever in terms either empowered the judiciary to control lawyers or regulate the practice of law, much less that it conferred original jurisdiction in disbarment cases, or in any other case upon the Supreme Court and Courts of Appeals. *In re Richards*, 333 Mo. 907, 63 S.W.2d 672, *In re Pate*, 232 Mo. App. 478, 107 S.W.2d 157. Rather it reasons that under the "separation of powers" provision of the Missouri Constitution (Pet. p. 11) all judicial powers are "confided to the courts", and that the practice of law before the courts so affects the functioning thereof as to be a part of the judicial branch of the government, so that lawyers by implication of law under said provision of the constitution become adjuncts of the courts and subject to supervision by the latter. *In re Richards, supra.* This contention becomes the predicate for the Missouri Courts' so-called "inherent power" over the lawyers of the state, we have discussed above.

But quite aside from the concept of "inherent power" of the Courts over the Bar by virtue of such provision for the separation of powers, the conclusion of the Missouri Supreme Court that it has "original jurisdiction" of dis-

barment cases, when the constitution limits its jurisdiction to "appellate jurisdiction only", is illogical and irrational. The Constitution in specifying the different courts making up the judiciary names the Circuit Courts (trial courts), the courts of appeals and other courts, as well as the Supreme Court (1945 Const., Art. V, Sec. 1). Would they not, especially the trial courts, also have inherent powers over the Bar for similar, and even more cogent, reasons to exercise such powers based upon their greater and more continuous contacts with the Bar? To say that the Supreme Court has "original jurisdiction" to try disbarment cases instead of appellate jurisdiction to which the constitution limits it in all cases, because the separation of powers clause "confides to the judiciary" the power to discipline the Bar is a *non sequitur*. Moreover, we have here the paradox of the Court pointing to the "separation of governmental powers" provision of the State Constitution as the source of both its claimed "inherent powers over the Bar" and its "original" jurisdiction in disbarment cases, on the one hand, and on the other hand violating every aspect of the same provision in the procedures to be followed in such cases which the Court sets up in its Rule 5! (Pet. pp. 5, 66-72).

For the uncertain and doubtful status of the Court's holding that the Supreme Court and the several courts of appeals have "original jurisdiction" or "inherent power" in disbarment proceedings under the Missouri Constitution, see the Court's discussion of this matter in *In re Richards*, 333 Mo. 907, 63 S.W.2d 672, wherein Richards attacked such jurisdiction, particularly as to "original" jurisdiction on the authority of *In re Sizer & Gardner*, 300 Mo. 369, 254 S.W. 82, and other authorities. The court, p. 673, referred to its former case of *Selleck* v. *Reynolds*, 252 Mo. 369, 158 S.W. 671, and said concerning its holding in Selleck:

> "While conceding that the case * * * 'did not fall within these granted powers, and that the legislature could not add to the powers named in the Constitution, this Court in banc held * * * the St. Louis Court of Appeals possessed inherent power to disbar * * *"

The Court went on to state that in *Sizer, supra,* that the Court by five to two denied a similar contention, though the judge who wrote the opinion agreed that the Court did not have jurisdiction under the Constitution, but since the Court had upheld jurisdiction for many years he thought it unwise to overrule those cases. Also that three judges concurred only in the result.

The Missouri Supreme Court, Westhues, J., in *Auto Club* v. *Hoffmiester,* (1960) 332 S.W.2d 957, 959, wherein a review was sought of the determination by the St. Louis Court of Appeals of an appeal from a judgment of a Circuit Court in a case involving the unlawful practice of law covered by these rules of the Supreme Court, said:

> "Appellate jurisdiction of this court is fixed by Sec. 3 of Art. V, 1945 Const. of Mo., V.A.M.S. The legislature cannot nor may this court by rule enlarge that jurisdiction except as provided for in that section of the constitution. 21 C.J.S. Courts, Sec. 400, p. 641; St. ex rel. Wabash Ry. Co. v. Shain, 341 Mo. 19, 106 S.W.2d 898."

On this question of whether or not the Supreme Court has "original jurisdiction" or the Judiciary in Missouri has "inherent power" over the Bar, it must not be overlooked that in the cases from other jurisdictions heretofore cited and relied upon in the Court's opinion and in Respondent's Brief, the power of the court was definitely traced, and shown to have been conferred upon the Court by the Constitutions of the States or other valid state legislation, which was not the case in Missouri.

Thus, in *Cohen* (81 S. Ct. 954), and *Anonymous Nos. 6 and 7* v. *Baker*, 79 S. Ct. 1157, which arose out of the same "Inquiry" set up by the Appellate Division of the Supreme Court (Trial Court) of New York, this Court said:

> "These practices have received legislative approval, evidenced by Sec. 90, subd. 10 of the State Judiciary Law, * * *" (79 S. Ct. 1160).

Also in *Gair* v. *Peck*, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491, 160 N.E.2d 43, the New York Court referred to Justice Cardozo's opinion in *Karlin* v. *Culkin*, 248 N.Y. pp. 471-472, where he reviewed New York's statutory law giving the Supreme Court power of control over lawyers and traced this power back to Sec. 27 of the 1777 New York's Constitution.

Similarly, in *Lathrop* (81 S. Ct. 1826), it was shown that the Wisconsin Supreme Court in setting up the integrated Bar of that state implemented a statute of the Legislature directing the Court so to do.

Also, in *Frankel*, 20 N.J. 588, 120 A.2d 603, cited in the Missouri opinion herein, Mr. Justice Brennan, then on the New Jersey Supreme Court, said in a dissenting opinion:

> "So it is that the people of New Jersey constitutionally cast upon this Court the power exclusively to determine the discipline to be imposed. Const. 1947, Art. VI, Sec. II, par. 3 * * *" (p. 611).

The text in pertinent part of this section of the Constitution is:

> "* * * The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted" (p. 1029, Rev. Sts. Cum. Supp. N.J. 1948, 1949, 1950).

In the light of the above, Respondent, p. 13, puts his finger upon one of the "basic elements" of Due Process which is lacking in this case in his quotation from Powell, and that is the requirement that there be "a legally competent tribunal having jurisdiction of the case". That the Court had no jurisdiction of the subject matter of the case cannot be waived, and may be raised any time before the final execution under the void judgment.

In the case of *State ex rel. Wulfing* v. *Mooney*, 362 Mo. 1128, 247 S.W.2d 722, the Court, *en Banc*, said (l.c. 724):

> "Jurisdiction of this court is limited by sections 3 and 4 of Article V of our Constitution. Section 3 gives this court exclusive appellate jurisdiction in certain cases, while under section 4 this court has original jurisdiction in remedial writs in exercising superintending control over inferior courts and tribunals."

"Original remedial writs" has a well known meaning in Missouri. It includes Habeas corpus, prohibition, mandamus, certiorari and quo warranto. It has never been supposed that disbarment procedures qualified under this classification.

For the reasons stated in the Petition and in this Reply Brief Petitioner respectfully submits the petition should be sustained and a Writ of Certiorari issued to the Supreme Court of Missouri and that upon a review the opinion of that Court should be ordered quashed.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of the Missouri Constitution, 1945, read as follows:

"§ 1. **Judicial power—constitutional courts**

Section 1. The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

"§ 3. **Jurisdiction of the supreme court**

Section 3. The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the revenue laws of this state, the title to any office under this state, the title to real estate, in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, in all cases of felony, in other classes of cases provided by law, and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five dollars."

"§ 4. **Superintending control of superior over inferior courts—original remedial writs**

Section 4. The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

Article VI, §§ 2 and 3, Missouri Constitution, 1875, provide as follows:

"§ 2. **Supreme Court, jurisdiction of**

The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided."

"§ 3. **Supreme Court, superintending control of—power to issue original writs**

The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same."